Supreme Court, U.S.
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No. 02-45

In The
Supreme Court of the United States

CAROLYN MURPHY TAYLOR
Petitioner,

v.

WIL LOU GRAY OPPORTUNITY SCHOOL, MARY CATHERINE NORWOOD, IN HER OFFICIAL CAPACITY AS SUPERINTENDENT OF WIL LOU GRAY OPPORTUNITY SCHOOL, AND THE DIVISION OF HUMAN RESOURCES MANAGEMENT OF THE SOUTH CAROLINA BUDGET AND CONTROL BOARD,
Respondents.

On Petition for Writ of Certiorari to the Court of Appeals for the State of South Carolina

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where state law provides for performance evaluations of state employees, and the evaluations are held inadequate, does the state violate a state employee's right to equal protection when it complies with state law for that employee, but fails to comply with state law regarding other evaluations for which the required procedure was not followed?

2. Is a litigant's right to due process violated when notice of hearing states that the hearing is on a motion for reconsideration and the court notifies the litigant after the hearing that the hearing was de novo?

PARTIES

The caption of the case includes all parties to the proceedings in the circuit court and the court of appeals.

TABLE OF CONTENTS

Page

Questions Presented i

Parties ii

Table of Contents iii

Table of Authorities v

Cases v

Statutes vii

Other Authorities vii

Petition for *Writ of Certiorari* 1

Opinions Below 1

Jurisdiction 1

Constitutional Provisions Involved 1

Statutes and Regulations Involved 2

Statement of the Case 2

The Proceedings Below 5

Reasons for Granting the Writ:

I. The Court of Appeals' Sanctioning of Defaulting Only One State Agency Employee's Performance Evaluation When the State Admitted that All the Evaluations were the Product of the Same Faulty Evaluation Process Is in Conflict with a Previous Decision of this Court. 7

II. The Administration of State Laws and Regulations Regarding Performance Evaluations Was Discriminatory Against One Employee in a Class, In Contravention of the Equal Protection Clause of the Fourteenth Amendment. 8

The State Intentionally Discriminated Against Taylor 10

III. No Rational Relationship Exists Between the State's Purpose in Enacting Performance Evaluation Laws and Taylor's Classification. 12

IV. The South Carolina Court of Appeals Erred in Applying the Rational Relation Test to a Case That Involved Constitutional Issues. 15

V. Taylor's Right to Due Process of the Law Was Violated When the Circuit Court Failed to Notice Her to Prepare for a De Novo Hearing on a Discreet Motion to Reconsider. 16

Conclusion 19

TABLE OF AUTHORITIES

Page

CASES

Armstrong v. *Manzo*, 380 U.S. 545 (1965) 18

Bauer v. *Bailar*, 647 F2d 1037 (10th Cir 1981) 15, 14

City of Cleburne v. *Cleburne Living Ctr.*,
473 U.S. 432 (1985) 9

Connick v. *Myers*, 461 U.S. 138 (1983) 16

Grannis v. *Ordean*, 234 U.S. 385 (1914) 18

Griggs v. *Duke*, 401 U.S. 424 (1971) 9,14

Harrah Independent School Dist. v. *Martin*,
440 U.S. 194 (1979) 7, 8, 12

Heragney v. *University of Washington*,
642 F2d 1157 (9th Cir 1981) 14

Joint Anti-Fascist Refugee Comm. v. *McGrath*,
341 U.S. 123 (1951) 18

Keyishian v. *Board of Regents*, 385 U.S. 589 (1967) 16

Kimbrough v. *Secretary of United States Air Force*,
764 F2d 1279 (9th Cir 1985) 14

Logan v. *Zimmerman Brush Co.*,
455 U.S. 422 (1982) 17, 18

Massachusetts Board of Retirement v. *Murgia*,
427 U.S. 307 (1976) 8, 12

Mathews v. *Eldridge*, 424 U.S. 319 (1976) 8, 12

McDonnell Douglas Corp. v. *Green*,
411 U.S. 792 (1973) 9, 14

Memphis Light, Gas & Water Div. v. *Craft*,
436 U.S. 1 (1978) 17

Mullane v. *Central Hanover Bank & Trust Co.*,
339 U.S. 306 (1950) 19

NAACP v. *Claiborne Hardware Co.*,
458 U.S. 886 (1982) 16

Perry v. *Sindermann*, 408 U.S. 593 (1972) 15

Personnel Administrator of Mass. v. *Feeny*,
442 U.S. 256 (1979) 11

Pickering v. *Board of Education*,
391 U.S. 563 (1968) 15

Rowe v. *General Motors Corporation*,
457 F2d 348 (5th Cir 1972) 14

Royster Guano Co. v. *Virginia*,
253 U.S. 412 (1920) 10, 14

Snowden v. *Hughes*, 321 U.S. 1 (1944) 9, 10

Village of Arlington Heights v. *Metro. Housing Dev. Corp.*,
429 U.S. 252 (1977) 10

Washington v. *Davis*, 426 U.S. 229, 247 (1976) 14

Watson v. *Fort Worth Bank & Trust*,
487 U.S. 977 (1988) 9, 13

STATUTES

23A S.C. Code Ann. Regulation 19-704, (1983) 2, 3

23A S.C. Code Ann. Sub-regulation 19-704.02 (1983) 2

S.C. Code Ann. § 8-27-10 through 8-27-50
(Whistleblower's Act) 5, 15

OTHER AUTHORITIES

5 C.J.S. Section 761(c) 18

Uniform Guidelines on Employee Selection Procedures,
29 CFR Section 1607.4(c) (1984) 13

PETITION FOR A WRIT OF CERTIORARI

Petitioner Carolyn Murphy Taylor respectfully petitions this Court to issue a *writ of certiorari* to review the judgment of the South Carolina Court of Appeals filed August 16, 2001 and unreported.

OPINIONS BELOW

The opinion of the South Carolina Court of Appeals in *Carolyn M. Taylor* v. *Wil Lou Gray Opportunity School, Mary Catherine Norwood, in her official capacity as Superintendent of Wil Lou Gray Opportunity School, and the Division of Human Resources Management of the South Carolina Budget and Control Board,* (App. at 3-20), and its order denying reconsideration, (App. at 21-22), are unreported. The petitioner sought review by the Supreme Court of South Carolina, which was denied April 4, 2002, (App. at 23-24), and is unreported.

The underlying decisions of the South Carolina Court of Common Pleas and the South Carolina Grievance Committee are reproduced in the Appendix, *infra,* and are unreported.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendments of the United States Constitution guarantees that all persons in a class be treated alike. The Due Process Clause of the Fourteenth

Amendment guarantees procedural rights. The First Amendment guarantees free speech.

STATUTES AND REGULATIONS INVOLVED

South Carolina regulates the evaluation of the performance and productivity of its employees by means of Regulation 19-704 , 23A S.C. Code Ann. Regulation 19-704, (1983). Sub-regulation 19-704.02, entitled "State Personnel Rules and Regulations," requires state agencies to develop and follow their own Employee Performance Management System ("EPMS"). (App. at 59)

STATEMENT OF THE CASE

Carolyn M. Taylor ("Taylor") was a math and science teacher at Respondent Wil Lou Gray Opportunity School ("WLGOS") in South Carolina. WLGOS is a state agency that serves as a residential alternative school for at-risk high school students. Taylor became critical of the school's administration and reported agency malfeasance to the state Department of Education and other governmental entities, and to members of the legislature. Ultimately, she was terminated in a reduction in force ("RIF") . Taylor maintains the agency intentionally discriminated against her and fired her for whistleblowing. The salient facts follow.

Taylor began teaching at WLGOS in 1986. Two years later the agency hired a new principal. Taylor was concerned that he failed to follow South Carolina laws and regulations setting forth employee evaluation procedures (App. at 75-77).

Respondent Division of Human Resources Management of the South Carolina Budget and Control Board establishes employee

evaluation procedures under color of statute. Agency supervisors evaluate employees annually. Supervisors (in this case, the principal) must complete specific stages of the evaluation at specific times during the year; they must use regulation evaluation instruments (forms) (app. At 78-80); and they are required to give employees their annual appraisals "prior to or on their performance review date." (App. at 61).

For each year relevant to the RIF plan, the principal either did not perform the specified evaluation stages, did not use the proper evaluation instruments, or did not give teachers their evaluations by their performance review date. Even though the evaluations were to be completed and sent to the Personnel Office by May 15 each year, (App. at 70), teachers did not receive evaluations one year until the last week of school.

Taylor complained to Respondent Mary Catherine Norwood, the agency superintendent. Taylor felt that in not following objective evaluation regulations, the principal was arbitrarily assigning teachers one of the three ratings: 1) Exceeds Performance Requirements; 2) Meets Performance Requirements; or 3) Below Performance Requirements. (App. at 67-68). The ratings accumulate from year to year and are a primary element in the computation of state employees' "retention points." Retention points determine which employees will be subject to termination in the event of a reduction in force. The lowest rated are most vulnerable.

Taylor wanted the principal's ratings replaced with the default rating of "meets performance requirements." Her request was based upon the statutory authority of 23A S.C. Code Ann. Regulation 19-704, (1983). (App. at 59). Regulation 19-704 provides for "the establishment and administration of an Employee Performance Management System (EPMS) for the agencies of State government." It further states that "[a]ny agency that does not develop an approved EPMS shall come automatically under the model system developed by

the State Personnel Division." Respondent WLGOS uses the model system that states, *inter alia*, that "[i]f an employee does not receive an annual appraisal prior to or on their performance review date, the employee shall be rated 'meets performance requirements' by default." (App. at 61).

Norwood investigated and concluded Taylor's allegations were true. She directed the principal to comply with regulations, then monitored his progress. Norwood also ordered that for the year teachers did not receive evaluations until after the performance review date, only Taylor would receive the requisite default "meets performance requirements" rating.

Taylor then went to the agency's Board of Trustees. She wrote board members individually. She sat in on - and videotaped - board meetings. The Board ordered an investigation. It, too, confirmed Taylor's allegations. However, the Board rejected defaulting the evaluations, concluding the evaluation process had been "consistently" deficient for all teachers.

Taylor next wrote and began to meet with government officials from the state Department of Education to the General Assembly. Her campaign abruptly ended in May 1992. Respondent Norwood informed Taylor that the agency was terminating her under a reduction in force it was implementing.

Respondent WLGOS said budgetary constraints compelled it to operate with three fewer teachers. The RIF called for the termination of the three nonexempt teachers with the lowest number of retention points. Taylor was the 3rd of the three. She would not have been among them had the agency replaced all of the principal's evaluation ratings with the default rating, as required.

Respondent WLGOS had other opportunities to keep Taylor employed. The first was the unexpected resignation of a teacher the

last day of school. That meant the agency could have met its force reduction goal by terminating only two teachers.

The French position presented another opportunity. Under Section IX of the RIF policy (App. at 55), Taylor, who is board qualified to teach French, should have been assigned the position because the teacher occupying the position had fewer retention points than Taylor. Instead of giving Taylor the position, the agency exempted the French teacher.

Yet another opportunity to keep Taylor employed was to place her in a federally funded position teaching math. The agency said it did not do so because the position was a temporary one.

All these events led Taylor to the conclusion that the agency targeted her for termination because of her whistleblowing activities.

THE PROCEEDINGS BELOW

Taylor attempted to grieve her termination, but WLGOS and the state Budget and Control Board said it was not grieveable. Taylor hired a lawyer, petitioned the circuit court for judicial review, and sued the school, the superintendent, and the state Human Resources Division. She alleged causes of action under the Whistleblower's Act (S.C. Code Ann. § 8-27-10 through 8-27-50), the First Amendment of the United States Constitution, and 42 U.S.C. § 1983. The circuit court referred the matter to the State Employee Grievance Committee ("Committee") and charged it with determining whether Taylor was discharged "due to a *bona fide* reduction in force or was the result of her whistleblowing."

The Committee held a three-day hearing and issued its Final Decision. (App. at 48). The Committee found the teacher evaluations faulty in all the respects mentioned hereinabove. Nevertheless, it ruled Norwood was justified in giving only Taylor the default rating

because Taylor "was the only one to complain." The Committee concluded Taylor was terminated not for whistleblowing, but pursuant to a *bona fide* RIF.

Taylor petitioned the circuit court for judicial review of the Final Decision. The matter was heard by circuit court Judge L. Henry McKellar. Affirming the decision, the judge issued a memorandum order that quoted extensively from the Grievance Committee hearing App. at 42-47). Taylor filed a motion to reconsider. Subsequently, she discovered the judge never reviewed the record. It was in the clerk's office with the seal intact. Taylor's attorneys asked to be relieved and Taylor was forced to proceed, *pro se*, with a recusal motion based on judicial bias.

Some time later Taylor received notice of a hearing on her reconsideration motion. (App. at 71-72). The notice stated the motion would be heard by another circuit court judge, James Barber. At the time of the hearing, November 5, 1997, the recusal motion was still pending. Because it was, Judge Barber several times stated he did not know what type of hearing it was. Taylor asserted he had no jurisdiction and she did not consent to its transfer. The second judge proceeded over her objections.

Some weeks later Judge Barber wrote the parties to announce he had held a de novo hearing and he intended to affirm the Grievance Committee decision (App. at. 73-74). Another hearing was set. The recusal motion before the first judge was still pending.

At a hearing on January 20, 1998, Judge Barber produced an unfiled form order of recusal signed by Judge McKellar and dated November 7, 1997. (App. at 40). That date was two days after the November 5 hearing that Judge Barber now declared was a de novo hearing. He overruled Taylor's objections and affirmed the Grievance Committee. The recusal order was not filed until February 17, 1998.

After being denied reconsideration (App. at 25-29) of Judge Barber's order (App. at30-39), Taylor appealed to the South Carolina Court of Appeals.

The Court of Appeals affirmed the circuit court. The court used the "rational relation" standard of review and held the agency had not violated Taylor's equal protections rights. The court also determined that jurisdiction was transferred to Judge Barber and Taylor received due process.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' Sanctioning of Defaulting Only One State Agency Employee's Performance Evaluation When the State Admitted that All the Evaluations were the Product of the Same Faulty Evaluation Process Is in Conflict with a Previous Decision of this Court.

Even though all teacher evaluations were the product of the same faulty evaluation procedures, the Court of Appeals upheld the lower tribunals' justification that Taylor's distinction as the sole complainant was reason enough to subject only her to the applicable state rules and regulations. That holding conflicts with this Court's holding in *Harrah Independent School Dist. v. Martin*, 440 U.S. 194 (1979).

In *Harrah* the classification of teachers was based on which ones had complied with continuing education requirements. The petitioner was classified as one of five teachers who had not complied with the requirements. Based upon that classification, petitioner claimed a violation of her right to equal protection of the law under the Fourteenth Amendment.

The Court found petitioner's reliance on the equal protection

clause misplaced because she neither asserted nor established the existence of any suspect classification or the deprivation of any fundamental constitutional right. Therefore, the Court held, petitioner's only inquiry could be whether the state's classification was "rationally related to the state's objective. *Harrah* (*quoting Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 315 (1976). The Court found no violation of equal protection because the petitioner forfeited the right to her job by refusing to comply with the job requirements.

Here, the petitioner shows the deprivation of her right to free speech. There is no pretense by the state that creating a separate classification for Taylor furthered a legitimate state goal. Or that its classification of her was "rationally related" to any of its own objectives. Thus, the holding below directly conflicts with the holding in *Harrah*.

This Court should address the issue of whether an employee gives up her right to equal protection when she exercises her right to freely speak about her employer's failure to apply a statutorily invoked regulation equally.

Placing the employee in a different class solely because she was the only one who complained about a condition suffered by all employees is a penalty and sanction that violates her First Amendment right to free speech. Such classifications are arbitrary, unreasonable, and unrelated to any legislative purpose. It contravenes the legislature's purpose in enacting laws to ensure the standardized, objective evaluation of state employees.

II. The Administration of State Laws and Regulations Regarding Performance Evaluations Was Discriminatory in Contravention of the Equal Protection Clause of the Fourteenth Amendment.

A state is prohibited from denying equal protection in the administration of its laws and regulations. Even where a law is facially neutral, if the administration or enforcement of that law favors one class while disfavoring another, then the Equal Protection Clause is violated. *Snowden* v. *Hughes*, 321 U.S. 1 (1944). South Carolina's laws and regulations regarding performance evaluation are neutral on their face, but in targeting Taylor for different treatment, the administration of those laws and regulations was discriminatory.

Two components are considered in determining whether an administrative action violates equal protection. The first is substantive, *i.e.*, whether the end sought to be achieved by the government is a legitimate governmental purpose. The second component is procedural, *i.e.*, whether the classification appropriately furthers the legislative purpose. *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432 (1985). In this case, the end sought was a legitimate governmental purpose, but the classification of Taylor alone furthered no governmental purpose.

Addressing Title VII discrimination in *Griggs* v. *Duke*, 401 U.S. 424 (1971), this Court made clear that procedures utilized by employers cannot be fair only in form. They must be fair in operation. This Court is not solely concerned with the motivation of employment procedures. It is also considers the consequences of those procedures. The Constitution proscribes practices that are overtly discriminatory; it also proscribes those that are fair in form, but discriminatory in operation.

This Court, in *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977 (1988) (*quoting McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, (1973), admonished the parties to look beyond a facially neutral practice, noting "such a practice adopted without discriminatory intent may have effects that are indistinguishable from intentionally discriminatory practices." The Court further stated that "no inference of discriminatory intent may be drawn from the customary and

reasonable practice . . . of leaving promotion decisions to the unchecked discretion of the lower level supervisors most familiar with the jobs and candidates, (but) it does not follow that these supervisors always act without discriminatory intent."

The decision below conflicts with the interpretation of the Equal Protection Clause propounded in nearly a century of Court decisions. The clause requires a state to "apply the law equally to persons similarly situated." *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920).

This Court should grant *certiorari* to make it clear to lower courts that state employees subjected to the discriminatory administration of a state's laws and regulations are protected by the constitution and have a right to seek redress.

THE STATE INTENTIONALLY DISCRIMINATED AGAINST TAYLOR

The mere unequal application of a statute is not a denial of equal protection in and of itself. *Snowden, supra.* Among the factors recognized as probative in determining whether discriminatory intent exists is the "specific sequence of events leading up to the particular decision being challenged, including any significant departures from normal procedures." *Village of Arlington Heights* v. *Metro. Housing Dev. Corp.*, 429 U.S. 252 (1977) (emphasis added). In addition to refusing to default all teacher evaluations, the agency departed from normal procedure on several occasions regarding Taylor and keeping her employed.

First, the agency exempted the French teacher, who had fewer retention points than Taylor. Section IX of the RIF policy, (App. at 55), required Respondent WLGOS to place a teacher subject to termination

under the RIF in any position for which she was board qualified, where the teacher then holding the position had fewer retention points than the subject teacher. Three teachers, including Taylor, were board qualified in French. All three had higher retention points than the French teacher.

At the Grievance Committee hearing, Respondent Norwood admitted she did not know who was qualified to teach the course. Norwood said she exempted the French teacher because she was certified in French. However, the language in the RIF policy was clear and it nowhere contemplated such an exemption. The plain language of the policy was for the protection of teachers, like Taylor, who were qualified to teach a subject and who had greater retention points than the person teaching the subject.

Second, the agency could have given Taylor a math position funded by a Chapter One federal grant. Section V, ¶ 3 of the RIF plan, (App. at 53), specifically provided for the placement of a permanent employee in any position within the agency occupied by a temporary employee, where the permanent employee had previously held permanent status. Taylor was certified in math, but the agency maintained the grant was for a temporary employee and Taylor was a full-time employee.

Finally, on the day Taylor's termination went into effect, another teacher unexpectedly resigned. According to the RIF plan, her resignation meant that only two teachers needed to be terminated.

All of these factors point squarely to discriminatory intent. This sort of "intent" implies more than intent as a volition or as awareness of consequences. It implies that the decision maker selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects on an identifiable group or person. *Personnel Administrator of Mass.* v. *Feeny*, 442 U.S. 256, 279 (1979).

If the Court of Appeals decision is allowed to stand it will significantly impair the right of public employees to speak out about government malfeasance. The decision is particularly egregious in light of the precarious state of the economy, the number of employees losing jobs at state agencies, and the number of personal bankruptcies being filed. To allow this decision to stand would be tantamount to condoning the chilling of a state employee's right to free speech, and would result in unchecked abuses of power by the state.

Here, school administrators refused to comply with state laws and regulations regarding performance evaluations. Yet it was the petitioner who suffered the consequences of their noncompliance. Even more egregious is the fact that had the state followed its own laws and regulations, Taylor would have survived the RIF.

III. No Rational Relationship Exists Between the State's Purpose in Enacting Performance Evaluation Laws and Taylor's Classification.

Equal protection requires a rational relationship between the classification and the legislative purpose sought to be achieved. *Harrah, supra; Massachusetts Board of Retirement, supra.* The state's goal in mandating objective procedures for evaluating its employees is to ensure that the evaluations are as fair as possible. That purpose is rationally related to the state's interest in employing persons who can competently and adequately perform their jobs for the benefit of the public they serve.

Objective evaluation procedures serve to check and balance inherently subjective performance evaluations. The Court of Appeals noted that "[p]erformance evaluations of any employee, including classroom teachers, require the exercise of judgment and discretion on the part of the supervisor." However, unchecked "judgment and discretion" provides a Petrie dish of opportunity for unfairness and

favoritism. South Carolina clearly was concerned with this when it enacted laws and regulations standardizing the evaluation process.

The appellate court stated the principal "acknowledged that he had not conducted formal observations . . . [and] had not spent as much time in some classrooms as in others." The principal explained "he evaluated every teacher . . . almost daily . . . through less formal means . . . through walks in the hall, short visits, and short discussions . . .." The court noted that the principal admitted "the form he used may not have been the correct form . . . [and] he would do the evaluations again on the correct form . . .." (App. at 11-15). However, the Court of Appeals overlooked, or ignored, the fact that these violations of procedure by the principal are the very reason the state enacted performance evaluation laws - to prevent the personalized evaluation method the principal employed.

Here, as in a Tenth Circuit case, *Bauer* v. *Bailar*, 647 F2d 1037 (10th Cir. 1981), the proper evaluation forms would have provided guidance for the evaluator and fairness for the evaluated. The Tenth Circuit noted that although the evaluations by each candidate's supervisor involved subjective judgments, the appraisal forms themselves provided considerable guidance to the evaluator. The court additionally noted that an advisory panel also subjectively evaluated candidates. "However, the evaluation was guided by written standards. . . . The forms used by the advisory panel contained written guidelines and specific areas in which each candidate was to be evaluated."

The potential for abuse in this area is so pervasive that the Equal Employment Opportunity Commission promulgated Uniform Guidelines on Employee Selection Procedures, 29 CFR Section 1607.4 (c) (1984). The Guidelines proscribe discriminatory tests as impermissible unless "shown by professionally acceptable methods to be predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job." *Watson*,

supra (*quoting Washington* v. *Davis*, 426 U.S. 229, 247 (1976)).

Subjective employment practices have been extensively litigated in state and district courts because of the potential of abuse. "[P]romotion and transfer procedures which depend almost entirely upon the subjective evaluation and favorable recommendation of the immediate foreman are a ready mechanism for discrimination . . . which can be covertly concealed . . .." *Rowe* v. *General Motors Corporation*, 457 F2d 348 (5th Cir. 1972). "Subjective hiring and promotion decisions, particularly where made in the absence of specific standards and guidelines may not go unexplained. . . . Obviously subjective decision making provides an opportunity for unlawful discrimination." *Bauer, supra.* "Subjective practices are particularly susceptible to discriminatory abuse and should be closely scrutinized, even though subjective practices and decisions are not illegal per se." *Heragney* v. *University of Washington*, 642 F2d 1157, 1163 (9th Cir. 1981); *Kimbrough* v. *Secretary of United States Air Force*, 764 F2d 1279, 1284 (9th Cir. 1985).

This Court, too, has long been concern with subjective practices. Discussing discrimination under Title VII in *Griggs, supra*, this Court observed that even though subjective practices are not discriminatory *per se*, they are "particularly susceptible to discriminatory abuse and should be closely scrutinized." *McDonnell Douglas, supra.*

The United States Constitution requires states to apply the law equally to persons similarly situated and "any differences of application must be justified by the law's purpose." *Royster, supra.* Placing Taylor in a separate class because "she was the only one to complain," is not and cannot be related to any rational state purpose. It did not further the state's goal in ensuring that Taylor was performing adequately in the classroom. Neither did it further the goal of ensuring she was competent nor satisfy any other goal or purpose of the state.

Taylor did not request that only her evaluation be changed to comply with rules and regulations. Nor did she complain about the irregularity of her evaluation only. Taylor complained that all evaluations were the product of utter subjectivity in contravention of state laws and regulations. The only purpose fulfilled in changing Taylor's evaluation was placing her in a class for termination because she exercised her First Amendment right to free speech.

This Court should issue its writ of certiorari to correct the premise that a State may disregard the mandates of the Equal Protection Clause by creating a separate classification solely for a person who complains about a state agency's unlawful implementation of laws, rules and regulations.

IV. THE SOUTH CAROLINA COURT OF APPEALS ERRED IN APPLYING THE RATIONAL RELATION TEST TO A CASE THAT INVOLVED CONSTITUTIONAL ISSUES.

The Court of Appeals held: "As it concerns evaluations, . . . and no fundamental right is involved . . . (Taylor's) actions should be tested under the 'rational basis' test." (App. at 14). To the contrary, Taylor's right to free speech - a fundamental right under the First Amendment - is involved. Taylor filed suit on grounds that her First Amendment right had been abridged and that abridgement is clear in her appellate briefs. South Carolina has a Whistleblower's Act that is based upon and protects a state employee's First Amendment guarantee of free speech. Therefore, the appropriate standard for analyzing Taylor's claim is strict scrutiny.

A teacher's public criticism of his superiors on matters of public concern may not furnish the basis for termination of his employment. *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972); *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968). Speech on public issues

occupies the "highest rung of the hierarchy of First Amendment values. *Connick* v. *Myers*, 461 U.S. 138 (1983) (*quoting NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982). Nor may a government ". . . constitutionally compel persons to relinquish their First Amendment rights as a condition of public employment. *Keyishian* v. *Board of Regents*, 385 U.S. 589, 605-606 (1967); *Pickering, supra.*

Taylor's complaints addressed matters of public concern, not just matters of personal interest. Her right to speak out is clearly a fundamental right. Thus, the Court of Appeals erred in applying the "rational basis," rather than a stricter standard of review. This Court's review is warranted because the lower courts need guidance on when it is and when it is not appropriate to apply the "rational basis" test.

V. TAYLOR'S RIGHT TO DUE PROCESS OF THE LAW WAS VIOLATED WHEN THE CIRCUIT COURT FAILED TO NOTICE HER TO PREPARE FOR A DE NOVO HEARING ON A DISCREET MOTION TO RECONSIDER.

When Taylor appealed for judicial review of the Grievance Committee's Final Decision, the matter was heard by circuit court Judge Henry McKellar. He affirmed the decision by way of a memorandum order. The order quoted extensively from the transcript of the Grievance Committee hearing, and from documents entered into evidence. (App. at 42-47). Taylor filed a motion to reconsider. Three weeks later she discovered the entire record languishing in the clerk's office with the seal intact. She subsequently filed a recusal motion for judicial bias.

While the recusal motion was pending Taylor received notice of a hearing on her reconsideration motion. The notice stated that a different judge would preside. (App. at 67). At the time of the

hearing, the recusal motion was still pending and, therefore, the second judge said he did not know what type of hearing he was presiding over. A month later Taylor received a letter from the second judge informing her that the hearing before him had been a de novo hearing. (App. at 73). This was a violation of Taylor's right to due process of law.

Two inquiries are raised when a litigant alleges a violation of due process of law. The first inquiry is whether the litigant lost something that fits into one of the three constitutionally protected categories of life, liberty, or property. If so, t' .e inquiry is whether the litigant received the maximum measure of procedural due process under the circumstances then existing. *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1 (1978).

The notice misled Taylor. It informed her to prepare for a hearing on her reconsideration motion. Nowhere did it state or suggest in any way that she would be attending a new hearing or to prepare for a hearing de novo. Taylor relied, and had a right to rely, on the plain language of the notice. Notice must be reasonably calculated to afford a litigant a meaningful opportunity to present his side at the hearing. *Memphis Light, supra.*

Here, three factors are balanced to determine what process Taylor was due. First, consideration is given to the private interest that the official action would have affected. The second factor is the risk of an erroneous deprivation through the procedures used. Concomitantly considered is the probable value of additional procedural safeguards. The final factor is the government's interest, including any burdens, the additional procedural safeguard would have entailed. *Mathews* v. *Eldridge*, 424 U.S. 319 (1976).

Taylor had a property right in her job, an indisputably significant private interest. "The hallmark of property is an individual entitlement grounded in state law...." *Logan* v. *Zimmerman Brush Co.*,

455 U.S. 422 (1982). Due process requires fundamental fairness in the process that is due in the context of all the circumstances. *Mathews, supra.* The more significant the litigant's property interest and the more grievous his loss, the more formal the hearing should be. *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U.S. 123 (1951).

As to the second factor, the fundamental requisite of due process of law is the opportunity to be heard," *Grannis v. Ordean*, 234 U.S. 385 (1914), "at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo*, 380 U.S. 545 (1965). An appellate court is not bound by the findings of a lower court where the review is de novo. 5 C.J.S. Section 761(c).

The failure to inform Taylor before the hearing that the court would hear her case de novo deprived her of notice to prepare evidence she introduced at the original circuit court hearing. The Court did not retain the evidence as a part of the record. Consequently, the second judge had no opportunity to hear fully Taylor's complete presentation. "The risk of an inaccurate and unfair deprivation mounts when decision-making is one-sided." *Joint Anti-Fascist, supra.*

Although the argument can be made that the second judge could have made a decision based on the pleadings, briefs and other components of the record, such an argument does not comport with due process. Once the state has given the right, it cannot remove it except "for cause." *Logan, supra.* Therefore, once the second judge determined that Taylor was entitled to a de novo hearing, it could not withdraw that determination.

The third and final factor is the government's interest in the additional procedure. Here, the government would have incurred no burden in simply stating on the notice that the hearing would be de novo. It would have been as easy to write the hearing would be de novo as it was to write that the hearing would be on the motion to

reconsider. Providing accurate notice to Taylor would not have unduly burdened the circuit court.

At a minimum, due process requires that a person be given notice of impending actions and an opportunity for a hearing. It requires "Notice reasonably calculated, under all the circumstances, to apprize interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). The notice provided Taylor was constitutionally defective. It did not apprize Taylor of the pendency of a de novo hearing. Taylor was substantially prejudiced as a result.

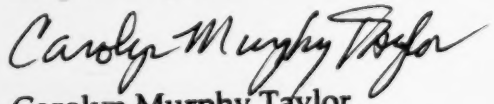
This court should grant certiorari to ensure that all litigants, especially *pro se* litigants and state employees, are afforded procedural rights as mandated by the Due Process Clause of the Fourteenth Amendment of the Constitution. State circuit courts may continue to arbitrarily violate litigants's due process rights if state courts of appeal are not held accountable for their decisions..

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that this Court issue a *writ of certiorari* to review the judgment of the South Carolina Court of Appeals.

July 2, 2002

Respectfully submitted,



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APPENDIX INDEX

Page

South Carolina Court of Appeals Order,
Heard September 11, 2000 - Filed August 16, 2001 ... App. 3

South Carolina Court of Appeals Order Denying
Petition for Rehearing, September 19, 2001 ..... App. 21

South Carolina Supreme Court Order Denying
Petition for Review, April 4, 2002 ..... App. 23

Circuit Court for Richland County Order (Judge Barber)
Filed August 19, 1998 ..... App. 25

Circuit Court for Richland County Order (Judge Barber)
Filed February 19, 1998 ..... App. 30

Circuit Court for Richland County Form Order (Recusal)
Filed February 17, 1998 ..... App. 40

Circuit Court for Richland County Order (Judge McKellar),
Filed December 20, 1996 ..... App. 42

South Carolina Employee Grievance Committee's
Final Decision, June 2, 1995 ..... App. 48

23A S.C. Code Ann. Regulation 19-704, (1983)
Employee Performance Management System ..... App. 59

State of South Carolina Employee Performance Management
System Model Policy ..... App. 60

App. 2

Teacher Final Evaluation page 1
of Teacher Evaluation Form ..... App. 67

Wil Lou Gray Opportunity School, Teacher Evaluation
and Conference Report page 2 of
Teacher Evaluation Form ..... App. 69

Notice of November 5, 1997 Hearing ..... App. 71

Judge Barber's Letter Dated December 12, 1997
to Bettis and Taylor. ..... App. 73

Sections of Transcript of 1995 Grievance Committee Hearing

Mary Catherine Norwood Direct Examination
by Mr. Nickles ..... App. 75

Donna Traywick Cross Examination
by Mr. Nickles ..... App. 78

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Carolyn M. Taylor,

Appellant,

v.

Wil Lou Gray Opportunity School, Mary Catherine Norwood, in her official capacity as Superintendent of Wil Lou Gray Opportunity School, and the Division of Human Resources Management of the South Carolina Budget and Control Board,

Respondents.

Appeal From Richland County
James R. Barber, III, Circuit Court Judge

Unpublished Opinion No. 2001-UP-384
Heard September 11, 2000 - Filed August 16, 2001

AFFIRMED

Carolyn M. Taylor, of Columbia, pro se.

Vance J. Bettis, of Gignilliat, Savitz & Bettis; and
Samuel L. Wilkins, both of Columbia, for respondents.

PER CURIAM: Carolyn M. Taylor appeals the order of the circuit court, which affirmed the State Employee Grievance Committee's order finding the termination of Taylor's employment from Wil Lou Gray Opportunity School was valid. We affirm.

FACTS

Taylor was a teacher at the Wil Lou Gray Opportunity School (WLGOS). WLGOS implemented a reduction in force (RIF), effective June 1, 1992, eliminating three teaching positions. Taylor was one of the three employees separated from employment under the RIF.

Taylor began working at WLGOS in October, 1986. She is certified in the areas of math and science, and she taught these subjects at the school. During her employment at WLGOS, she reported allegations of agency wrongdoing to officials in a number of government offices on numerous occasions. In April of 1992, the State Department of Education conducted an audit of WLGOS as a result of Taylor's report. Although the audit revealed three deficiencies, the complaints Taylor addressed in her report were held to be unfounded.

In May, 1992, the superintendent of WLGOS, Dr. Mary Catherine Norwood, notified Taylor of the RIF. Taylor and Two other employees were told they were losing their jobs because of the RIF. Taylor was told the RIF was necessitated by budget reductions.

PROCEDURAL HISTORY

On June 17, 1992. Taylor filed a grievance complaint. She asserted WLGOS had failed to demonstrate a financial condition that necessitated a RIF and had failed to apply properly the RIF. She also claimed that her termination was in retaliation for reporting alleged inefficiency and malfeasance in the operation of the school and for bringing a lawsuit for payment of her wages. Robert James, the

principal of WLGOS, denied Taylor's grievance on July 6, 1992. Taylor appealed James's decision to Dr. Norwood. In a letter dated July 31, 1992, Dr. Norwood stated there was no inconsistent or improper application of the reduction in force. She denied Taylor's grievance, explaining that a RIF is grievable only if it has been applied inconsistently or improperly.

Taylor appealed this decision to the State Employee Grievance Committee of the Budget and Control Board Division of Human Resource Management. By letter dated December 29, 1992, the Committee informed Taylor that because the State Personnel Director had determined there were no issues of fact regarding the contentions Taylor addressed in her grievance, her appeal to the Grievance Committee had been denied. The Committee concluded Taylor was terminated due to a valid reduction in force rather than in retaliation of any "whistleblowing" activities. Taylor asked for reconsideration of the decision and a hearing before the Committee. On April 23, 1993, her request for reconsideration was denied and the appeal process was concluded.

Taylor appealed to the circuit court in Richland County. With her appeal, she filed a complaint asserting claims against WLGOS for violation of the South carolina Whistleblowers Act, S.C. Code Ann. § 8-27-10 et seq. and violation of her right to Freedom of Speech. She also asserted claims against the State Budget and Control Board Division of Human Resource Management, claiming she was entitled to a hearing before the Grievance Committee. In a consent order filed December 14, 1994, the parties agreed a genuine issue of fact existed as to whether Taylor's separation from employment was due to a bona fide reduction in force or was the result of her whistle- blowing. The circuit court remanded the matter to the State Personnel Director for referral of Taylor's grievance appeal of her separation from employment to the Grievance Committee. It placed Taylor's other claims on the inactive roster pending Grievance Committee's final decision.

After an extensive hearing, the Grievance Committee found no credible evidence supported Taylor's charges that WLGOS acted pursuant to a RIF to retaliate against Taylor because of her earlier assertions of agency inefficiency or malfeasance. It concluded WLGOS acted in good faith and consistently and properly applied its RIF policy and plan. It held WLGOS's action were supported by reliable, probative, and substantial evidence in the case.

Taylor filed a petition in Lexington County for judicial review of the Grievance Committee's decision. She also requested her appeal be combined with her previous action. On agreement of the parties, the appeal was consolidated with the companion action for a hearing in Richland County.

In an order filed December 20, 1996, the Honorable L. Henry McKellar affirmed the Grievance Committee's Final Decision. Taylor filed a motion pursuant to Rule 59, SCRCP asking for the court to reconsider, alter, or amend the order. Taylor subsequently filed a motion for Judge McKellar to disqualify himself from considering her Rule 59, SCRCP motion. Counsel for WLGOS informed Judge McKellar that he did not object to the disqualification.

On November 5, 1997, the Honorable, James R. Barber held a hearing on Taylor's Rule 59, SCRCP motion. At the beginning of the hearing, Judge Barber acknowledged that Judge McKellar had not acted on the recusal motion. He stated he could not ask Judge McKellar about the motion because Judge McKellar was out of town. Counsel for WLGOS agreed to waive any objection to Judge Barber hearing the motion. On November 7, 1997, Judge McKellar signed a form order upon which he wrote, "I hereby recuse myself from this case & Judge Barber can hear the case de novo." This order was not filed immediately in the clerk's office.

On December 12, 1997, Judge Barber sent the parties a letter stating the hearing he held constituted a de novo hearing of the appeal. He instructed WLGOS's counsel to prepare an order

affirming the Grievance Committee's decision. In response to this letter, Taylor asserted that she did not believe Judge Barber had authority to consider her appeal while the motion to recuse Judge McKellar was pending. Judge Barber held another hearing on January 20, 1998 to address Taylor's concerns. At the hearing Judge Barber informed her that Judge McKellar had recused himself, but the order had not been filed because the file was in Judge Barber's office. On February 17, 1998, Judge McKellar's order of recusal was filed in the Clerk's office. Two days later, on February 19, 1998, Judge Barber's order affirming the Grievance Committee's decision was filed.

On February 24, 1998, Taylor filed a motion to vacate Judge Barber's order pursuant to Rule 60(b), SCRCP, asserting Judge Barber lacked jurisdiction at the time of the hearings and his order entered February 19, 1998 was void. On March 2, 1998, she filed a motion pursuant to Rule 59 (e), SCRCP to alter or amend the February 19 order. In addition to other issues, she raised the issue of Judge Barber's lack of jurisdiction. In an order filed August 19, 1998, Judge Barber denied both motions. Taylor served her notice of appeal on September 18, 1998.

STANDARD OF REVIEW

The standard of judicial review of proceedings before the State Employee Grievance Committee is governed by the South Carolina Administrative Procedures Act. See S.C. Dep't of Mental Health v. Moore, 295 S.C. 42, 367 S.E.2d 27 (1988). Pursuant to the APA, this court may reverse or modify an agency decision that is either affected by error of law or clearly erroneous in view of the reliable, probative, and substantial evidence in the record. S.C. Code Ann. § 1-23-380(A)(6)(Supp.2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." S.C. Dep't of Mental Retardation v. Glenn, 291 S.C. 279, 281, 353 S.E.2d 284, 286 (1987). When determining whether the record contains substantial evidence to support an administrative agency's

findings, neither the circuit court nor this court may substitute its judgement on the weight of the evidence for that of the agency. Id. The possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency's findings from being supported by substantial evidence. Id

DISCUSSION

I. Jurisdiction

A. Judge Barber's jurisdiction

Taylor argues Judge Barber lacked jurisdiction to conduct the November 5, 1997 and January 20, 1998 hearings. She asserts his final order is therefore void. We disagree.

Generally, an order is not final until it is written and entered by the clerk of court. First Union Natal Bank v. Hinman, Inc., 306 S.C. 327, 411 S.E.2d 681 (Ct. App. 1991), aff'd, 308 S.C. 421, 418 S.E.2d 545 (1992). "Until the paper has been delivered by the judge to the clerk of court, to be filed by him as an order in the case, it is subject to the control of the judge, and may by him be withdrawn at any time before such delivery." Bayne v. Bass, 302 S.C. 208, 209, 394 S.E.2d 726, 727 (Ct. App. 1990). However, when the court file is in the physical custody of a trial judge, that judge has the inherent power to receive documents and make them a part of the file, provided their receipt does not prejudice one of the parties. Loyd's Inc. v. Good, 306 S.C. 450, 412 S.E.2d 441(Ct App. 1991).

Judge McKellar signed an order recusing himself on November 7, 1997. At the hearing held January 20, 1998, Judge Barber informed the parties that he had Judge McKellar's Order of recusal. He explained it not been filed because the file was in his office. We find that when Judge McKellar gave the order of recusal to Judge Barber, who had possession of the court file, Judge McKellar relinquished control of the order. The order became effective then as

if it had been entered by the clerk of court. See Rule 5, SCRCP (allowing filing of papers with judge who transmits the papers to the office of the clerk). Accordingly, by January 20, 1998 hearing Judge Barber had jurisdiction over the case. We hold Judge Barber had jurisdiction to issue his order of February 19, 1998 affirming the Grievance Committee's decision.

B. Timeliness of appeal

WLGOS argues this court does not have jurisdiction to consider the appeal because Taylor did not timely serve her notice of appeal. WLGOS relies on this court's decision in Coward Hund Construction Co. V. Ball Corp., 336 S.C. 1, 518 S.E.2d 56 (1999).

In Coward Hund, we held the filing of second Rule 59, SCRCP motion after the order on the first motion did not stay the time for serving the notice of appeal. However, the procedural history of this case is distinct from Coward Hund.
In the present case, Judge McKellar granted Judge Barber authority to hear the case de novo, essentially vacating his own order. Judge Barber's order filed February 19, 1998 was the first order on his consideration of the merits of the appeal. Taylor's Rule 59, SCRCP motion filed March 2, 1998 was her first motion asking Judge Barber to alter or amend his findings. We find the motion stayed the time for the filing of the appeal. Furthermore, Taylor appealed the denial of her Rule 60(b), SCRCP motion as well as the orders on the merits. Taylor unquestionably timely appealed from this order. We hold this court has jurisdiction to consider the appeal.

II. Necessity of RIF

Taylor argues WLGOS failed to carry its burden of demonstrating that a RIF was necessary. We disagree.

The WLGOS RIF policy provides that affected employees be informed of the reason for the layoff. In her

memorandum dated May 4, 1992, Dr. Norwood informed Taylor, "This is to advise you that recent budget reductions have caused a reduction in force that will lead to the deletion of your position at the end of the school year." The Committee concluded that WLGOS adequately met this requirement with the Statement contained in Dr. Norwood's letter. In addition, the Committee held the credible evidence in this matter was that there was a budget reduction at WLGOS that required a reduction in force be implemented.

In her brief, Taylor acknowledges WLGOS experienced funding shortages, which required belt-tightening on the part of the agency. In asserting the RIF was unnecessary, she relies on a May 20, 1992 memorandum from the State Budget and Control Board's State Budget Division that states: "The analysis of expenditure requirements for fiscal year 1993 reflects no evidence to support or reject the need for implementation of the RIF Plan. Critical funding shortages are not apparent if it is assumed that the School will continue to operate at the current operational level." This memorandum further provided, "It is my belief that the School's management has made a joint decision not to continue to operate at the current level yet another year but rather to elevate the quality of service to students." It also noted WLGOS's physical plant was in critical need of maintenance and replacement of a school bus was needed but had not been funded due to shortages in state revenues.

Dr. Norwood testified that beginning in 1989, WLGOS experienced mid-year budget cuts and deallocation in state funding. In July of 1991, WLGOS had a major budget cut. As a result of the reductions, WLGOS took numerous measures to conserve funds. It reduced employees from twelve-month to ten-month and eleven month contracts, eliminated overtime, eliminated out-of state travel, stopped hiring substitute teachers, held open vacant positions, and sold an agency car. In early 1992, based on the economic forecast and anticipated further budget reductions, Norwood determined a RIF was necessary. The State Budget and Control Board's Division of Human Resource Management Approved WLGOS's RIF plan in April

of 1992.

We find substantial evidence to support the Committee's holding that WLGOS acted appropriately in implementing the RIF based on budget reductions.

III. Teacher Evaluations

Taylor argues WLGOS had a duty to set aside all performance evaluations, that were used in the calculation of retention points under the RIF Policy. We disagree.

The order of the RIF of permanent employees in each class was determined by accumulation of retention points. The retention points were based upon the years of service with the State and total scores on annual performance appraisals for the preceding two years. The points for evaluations were computed as follows: (1) three points for substantially exceeds requirements; (2) two points for exceeds requirements; (3) one point for meets requirements; and (4) no points for below requirements.

In 1988, WLGOS adopted the employee performance management system that was used in the calculation of retention points for the RIF. The system provides that is an employee does not receive an annual appraisal prior to or on their performance review date, the employee shall be rated "meets performance requirements" by default. Retention points for the RIF were calculated based upon the evaluation for the 1989-90 and 1990-1991 school years.

Taylor received evaluation of "meets performance requirements" for both years pertinent to the RIF. In June of 1990, Taylor complained to Norwood that Robert James, the principal of WLGOS did not adequately evaluate the teachers.
James acknowledged that he had not conducted formal observations on every teacher and that he had not spent as much time in some classrooms as in others. However, he explained he evaluated every

teacher on an almost daily basis through less formal means. He stated that in addition to classroom visits, he observed teachers through walks in the hall, short visits, and short discussions about what was happening in the classroom. James also acknowledged the form he used may not have been the correct form. In addition, James assured Norwood that he would schedule regular formal observations of each teacher for the 1990-1991 school. Taylor acknowledged that during the 1990-91 school year, James conducted informal and formal observations. However, she asserted he did not conduct a planning stage as required by WLGOS's employment performance management system.

In August of 1991, the Personnel Committee of the Board of Trustees of WLGOS issued a memorandum addressing a number of concerns Taylor had raised, including teacher evaluations. It determined the observation of teacher performance was inadequate. It found the use of the improper evaluation form "involved an unfortunate accident." The Board's committee noted that the superintendent had discussed these matters with the principal. It stated it did not anticipate any recurrence of either of these two problems.

Norwood testified that she interviewed other teachers to ascertain the level of James's observation and interaction with teachers in their classrooms. She stated no teacher other than Taylor contended that he or she thought the evaluations were inadequate. Norwood set aside Taylor's evaluation for the 1990-91 school year. She assigned Taylor the default rating of "meets performance requirements." Taylor did not request that the Board of Trustee invalidate the other teacher's evaluations. As no other teacher complained about the evaluations, the remaining evaluations were not set aside.

The Committee found:

Clearly, the inclusion of performance

appraisals in the computation of retention points is to discriminate among employees with similar years of service to allow the agency to retain those employees whose performance was judged to be better. Performance evaluations of any employee, including classroom teachers, require the exercise of judgement and discretion on the part of the supervisor. It was not sufficiently demonstrated that any of the defects in the form or process used in these evaluations invalidated the final results or required the agency to discount the results when implementing its reduction-in-force plan. The agency did not find, nor does any credible evidence herein reflect, that there was any bias, unfair consideration, or incompetency by the principal, Mr. James, in making the evacuations. All teachers were evaluated by the appropriated person for the purpose of assessing performance; the evaluations of all were reduced to writing on the same document; and then all employees were informed of the results. Setting aside these evaluations would be unfair to both the employees and the agency. Employees whose performance was recognized as exceeding performance standards would be penalized in the competition by the loss of points to which the policy entitled them, and the agency could be put in the position of retaining employees who had performed less well than others who would be laid off.

The idea of an evaluation defaulting to "meets performance standards" is a proper protection for employees who not receive their evaluations on time or at all. However, in determining that the evaluations done by Mr. James in 1990 and 1991 were inadequate, the agency did not determine the evaluations were invalid. In fact, the agency relied upon them to determine retention points. Since Mr. James's evaluations were used for all other teachers in determining retention points, the Committee concludes his evaluations of the Appellant should not have been set aside in favor of a default or presumptive "meets performance standards"

> evaluations, but should have been used. However, since the Appellant received "meets performance requirements" on the applicable evaluations, their utilization in determining the Appellant's retention points would not have changed the outcome in any way.

We find substantial evidence in the record to support these findings. Therefore, we find no error in the committee's decision that WLGOS did not have a duty to set aside all of the teachers' evaluations.

Taylor argues WLGOS's actions setting aside her evaluation while keeping the other teachers' evaluations violates her right to equal protection under the Fourteenth Amendment of the United States Constitution and Article I., section 3 of the South Carolina Constitution. As it concerns the evaluations, Taylor is not a member of a suspect or quasi-suspect class and no fundamental right is involved. Accordingly, WLGOS's actions should be tested under the "rational basis" standard. Bibco Corp. V. Sumter, 332 S.C. 45, 504 S.E.2d 112 (1998). To satisfy the Equal Protection Clause, a classification must (1) bear a reasonable relation to the legislative purpose sought to be achieved, (2) members of the class must be treated alike under similar circumstances, and (3) the classification must rest on some rational basis. D.W. Flowe & Sons v. Christopher Constr. Co., 326 S.C. 17, 482 S.E.2d 558 (1997).

All of the teachers were evaluated in the same manner that Taylor was evaluated. The Committee concluded WLGOS should have used Taylor's original evaluation rather than setting it aside in favor of a default or presumptive "meets performance stands" evaluation. Dr, Norwood set aside Taylor's evaluation due to her complaints. However, as the Committee noted, "(S)ince the Appellant received 'meets performance requirements' on the applicable evaluations, their utilization in determining the Appellant's retention points would not have changed the outcome in any way." WLGOS had a rational basis for keeping the other

teachers' evaluations as the evaluations were valid. In addition, its setting aside Taylor's evaluation did not violate her right to equal protection as it was done at her request and did not change the outcome in any way. Accordingly, we find no error in the circuit court's affirmance of the Committee's decision.

IV. Exemption of French teacher

Taylor argues WLGOS inappropriately exempted a French teacher from the reduction in force. We disagree.

Relying on Section IX of WLGOS's RIF policy,[1] Norwood excepted Lindsay Holiday, a French teacher, from the RIF explaining the exception was because, "in view of the fact that her skills and duties as foreign language teacher cannot be replaced by anyone with a greater number of retention points on the retention roster." Holiday was in Taylor's competitive class and had fewer

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[1] This Section provides:

Exemption in Special Cases

No employee shall be retained in preference to another employee in the competitive area and class who is higher in the order of the reduction in force, except under the following conditions:

> If the position of an employee is not to be abolished and the duties cannot be satisfactorily performed by any available employee higher in the order of selection after a reasonable training period, the employee may be retained in preference to the employee with higher retention points. In such case a statement of facts must be made in the plan of reduction in force and approved in advance by the Agency Head.

retention points than Taylor.

Although French was not required by WLGOS's defined minimum program at the time, two years of foreign language instruction was a prerequisite for admission to a state-supported college or university. Taylor asserts she and another teacher had higher retention points than Holiday and technically were capable of teaching French. A teacher is qualified to teach outside his or her area of certification if the teacher has six hours of college credits in the subject. One teacher, who was not certified in French, had taught Introductory French for one year during the mid-1980"s. Taylor took twelve hours of French when she was a student at Benedict College. She has not taken any courses in French since her graduation in 1967 and she has not taught the subject. Holiday had taught French courses during the years proceeding the RIF. Dr. Norwood testified, "I felt absolutely certain that there was no one higher in retention credits that could do the job as well as (Holiday) could do it."

The Committee held the decision to exempt Holiday from the RIF fell within the management prerogative of the agency. We find this holding supported by the substantial evidence.

V. Temporary grant position

Taylor asserts WLGOS violated it RIF Policy by failing to offer her a temporary grant mathematics position. We disagree.

At the time of the RIF, WLGOS had three temporary grant positions that were entirely federally funded. One of these positions was held by Edith Weaver, who taught remedial math. On the advice of the Attorney General's Office and the Division of Human Resource Management, WLGOS did not include the temporary grant positions in the RIF. Taylor asserts that as she was a math teacher with permanent employee status and Weaver as a math teacher with non-permanent employee status, she was entitled

to take over Weaver's position pursuant to the RIF policy.[2]

According to state law, temporary grant positions cease to exist and temporary grant employees must be terminated when the supporting grant ends. 1990 Act No. 612. Temporary grant employees are deemed to be employed at will. Id. The State Employee Grievance Procedures do not apply to them. Id. Furthermore, "(d)iscretionary determinations by a state agency or institution as to whether to hire an employee pursuant to this proviso are final and not subject to administrative or judicial appeal." Id. Donna Traywick, the Assistant Director of the Division of Human Resources Management, testified that under state policy, agencies are not required to "bump" temporary grant employees and replace them with permanent employees during a RIF.

The position itself is temporary in temporary grant positions. As Traywick explained, it is not possible for someone to hold permanent status in a temporary grant position. Thus, Taylor, who had only "bumping" rights to "any position within the agency for which such employee has previously held permanent status," was not entitled to a temporary grant position under the RIF.

VI. Retaliatory discharge

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[2] Section V of the WLGOS RIF policy provides:

> It shall be mandatory ... regardless of competitive area, to provide any permanent status employee affected by reduction in force the right to any position within the agency for which such employee has previously held permanent status and which is occupied by a temporary, probational, provision, or other nonpermanent employee. (Emphasis added).

Taylor asserts WLGOS failed to overcome the statutory presumption that her termination was the result of whistleblowing.

Under the Whistleblower Act in effect at the time Taylor's termination, a public body could not discharge or terminate any employee due to the employee's report of a violation of state or federal law or regulation or exposure of governmental "criminality, corruption, waste, fraud, gross negligence or mismanagement." S.C. Code Ann. § 8-27-20 (Supp.1992) (amended 1993 Act No. 164, Part II § 37A, effective June 21, 1993). The act contained a rebuttable presumption that the employee was wrongfully terminated if the employee was terminated within one year of reporting any violation of wrongdoing.[3] S.C. Code Ann. § 8-27-30 (Supp.1992) (amended 1993 Act No. 164, Part II, § 37-A, effective June 21, 1993). Notwithstanding the provisions of the act, a public body could discharge an employee for causes independent of whistleblowing. Gamble v. City of Manning, 304 S.C. 536, 405 S.E.2d 829 (1991). The question of whether an employer had an independent basis, other than employee's alleged whistleblowing activities, to terminate the employee is to be determined by the finder of fact. See Gamble 304 S.C. at 538, 405 S.E.2d at 830 (finding where evidence was susceptible of more than one reasonable inference regarding the reason for employee's termination, JNOV was properly denied).

As stated above, we find substantial evidence to support the Committee's decision that WLGOS acted appropriately (1) in implementing the RIF based on budget reductions, (2) in using the 1990 and 1991 evaluations in determining retention points, (3) in exempting the French teacher from the RIF, and (4) in Failing to offer Taylor a temporary grant mathematics position. Accordingly, we find substantial evidence to support the Committee's finding that these actions did not evidence WLGOS's bad faith in terminating Taylor.

---

[3]The 1993 amendment eliminated this presumption.

Taylor asserts WLGOS's termination of her after the resignation of Mary Flynn, who taught art and science, shows its bad faith. Flynn, who a certified art teacher resigned effective June 1, 1992. WLGOS advertised for and hired an art teacher after Flynn's resignation. Dr. Norwood testified having a visual arts teacher was critical to WLGOS receiving a special grant. In addition she explained the school found the arts, particularly visual arts, an important way to involve students in the curriculum. Taylor is not certified to teach art. We find substantial evidence supports the Committee's conclusion that WLGOS's decision to advertise and hire a certified art teacher to replace Flynn rather than retain Taylor, constituted the appropriate exercise of management discretion and is supported by substantial evidence. Furthermore, we find this decision does not support Taylor's allegations of bad faith.

Taylor argues WLGOS's failure to explore alternatives to terminating her and further failure to make a serious effort to assist her in finding other work evidence the agency's bad faith. She asserts WLGOS should have rehired her after a science teacher resigned during the school year following the RIF.

The Committee ruled, "There is not credible evidence supporting (Taylor's) charges that WLGOS acted pursuant to a reduction in force to retaliate against (Taylor) because of her earlier assertions of agency inefficiency of malfeasance." The Committee thus concluded, "On the record as a whole, we find that the agency acting in good faith, consistently and properly applied its reduction in force policy and plan, and the agency's actions are supported by the reliable, probative and substantial evidence in this case." As we find substantial evidence to support the Committee's decision that WLGOS acted appropriately in terminating Taylor pursuant to the RIF, we hold this failure to rehire her almost a year after her termination does not establish that she was terminated due to her whistleblowing activities.

CONCLUSION

Viewing the record as a whole, we agree with the circuit court substantial evidence supports the Grievance Committee's decision that WLGOS met its burden of establishing it terminated Taylor as a result of its consistent and proper application of its RIF and not as a result of her whistleblowing activities. Accordingly, the decision of the circuit court affirming the Grievance Committee is

AFFIRMED.

HUFF, HOWARD, and SHULER, JJ., concur.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Carolyn M. Taylor,

Appellant,

v.

Wil Lou Gray Opportunity School, Mary Catherine Norwood, in her official capacity as Superintendent of Wil Lou Gray Opportunity School, and the Division of Human Resources Management of the South Carolina Budget and Control Board,

Respondents.

Appeal From Richland County
James R. Barber, III, Circuit Court Judge

Unpublished Opinion No. 2001-UP-384
Heard September 11, 2000 - Filed August 16, 2001

ORDER DENYING PETITION
FOR REHEARING

Carolyn M. Taylor, of Columbia, pro se.

Vance J. Bettis, of Gignilliat, Savitz & Bettis; and Samuel L. Wilkins, both of Columbia, for respondents.

The Court after careful consideration of the Petition for Rehearing is unable to discover any material fact or principle of law which has been disregarded or overlooked.

The petition is therefore denied.

s/ Thomas E. Huff, J.
s/ William T. Howard, J.
s/ Shuler, J.

September 19, 2001

Columbia, South Carolina.

The Supreme Court of South Carolina

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April 4, 2002

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2295 Byrnes Drive
Columbia, SC 29204

Re: Taylor, Carolyn M. v. Wil Gray
1993-CP-40-2082 and 1993-CP-40-4005

Dear Ms. Taylor:

The Court has issued the following Order on your Petition for Writ of Certiorari in the above entitled matter:

"Petition for Writ of Certiorari Denied

s/ Jean H. Toal C.J.
For the Court

Justice Costa M. Pleicones
Not participating

April 04, 2004."

By copy of this letter we are advising all interested parties of the action of the Court in this matter.

Very truly yours,

s/ Daniel E. Shearouse
Clerk

DES/dmh

STATE OF SOUTH CAROLINA	)	IN THE COURT OF
	)	COMMON PLEAS
COUNTY OF RICHLAND	)	
	)	
Carolyn M. Taylor,	)	C.A. No. 93-CP-40-2082
	)	and
Plaintiff,	)	C.A. No. 95-CP-40-4005
	)	
	)	
v.	)	
	)	
Wil Lou Gray Opportunity School, Mary Catherine Norwood, in her official capacity as Superintendent of Wil Lou Gray Opportunity School and the Division of Human Resource Management of the South Carolina Budget and Control Board,	)	ORDER
	)	
	)	FILED
	)	98 AUG 19 PM 12:32
	)	
	)	BARBARA A. SCOTT
	)	C.C.C. & C.S.
	)	
Defendants	)	

This matter is before the court on plaintiff-petitioner Carolyn M. Taylor's motions to vacate and to alter or amend this court's Order filed February 19, 1998. In that Order, the court held that the State Employee Grievance Committee's Final Decision of June 2, 1995, upholding Taylor's termination from employment with defendant-respondent Wil Lou Gray Opportunity School "WLGOS") pursuant to a reduction-in-force was supported by substantial evidence and not affected by any error of law. Taylor filed a motion to vacate the February 19th Order under Rule 60(b)(4), S.C.R.C.P., on February 24, 1998, and on March 2, 1998, she filed a motion to alter or amend the judgment under Rule 59(e), S.C.R.C.P. The court heard argument on these motions on June 29, 1998. For the reasons expressed on the record at the hearing and for the following reasons, Taylor's motions

to vacate and to alter or amend the February 19th Order are denied.

1.

In support of her motion to vacate, Taylor argues that the undersigned lacked jurisdiction to rule on her original Rule 59(e) motion arising out of her appeal from the State Employee Grievance Committee's decision because Judge McKellar, to whom the case had originally been assigned, had not recused himself. The court rejects Taylor's contention that the undersigned lacked jurisdiction to enter the February 19th Order.

Judge McKellar originally heard Taylor's appeal from the Grievance committee's decision. Following a hearing on October 21, 1996, Judge McKellar entered an order filed December 20, 1996, affirming the Grievance Committee's final decision. Thereafter, Taylor filed a motion under Rule 59(e) to alter or amend the December 20th Order and a motion to recuse Judge McKellar from further involvement.

Taylor's Rule 59(e) motion was scheduled for hearing before the undersigned on November 5, 1997. At the outset of that hearing, the undersigned advised the parties that, since Judge McKellar was not then available, the undersigned would hear argument on the motion subject to Judge McKellar's recusing himself. The parties were informed that if Judge McKellar decided not to recuse himself, the motion would have to be reargued at a later time before Judge McKellar. Neither side objected to this manner of proceeding.

At the November 5th hearing, the undersigned afforded Taylor the opportunity to argue her appeal *de novo*. The hearing itself lasted nearly two hours, and Taylor not only fully argued her case but also submitted written memoranda in support of her arguments for reversing the Grievance Committee's decision. Two days after the November 5th hearing, Judge McKellar notified the undersigned that he had recused himself and was agreeable to the undersigned hearing the appeal *de novo*. Judge McKellar signed a written Order to that

effect that same day.[4]

Thereafter, the undersigned reviewed the administrative record (including the entire transcript of the proceedings before the Grievance Committee) and the legal memoranda submitted by the parties and concluded that the Grievance Committee's decision should be affirmed. On February 19, 1998, the undersigned entered an order affirming the Grievance Committee's decision.

It is unquestionably true that if Judge McKellar had not agreed to recuse himself, the undersigned would not have had jurisdiction to rule on Taylor's original Rule 59(e) motion seeking reconsideration of Judge McKellar's December 20, 1996, Order. Judge McKellar, however, did recuse himself on November 7, 1997, and so notified the undersigned prior to the undersigned's ruling on Taylor's original Rule 59(e) motion. Indeed, even if Judge McKellar's Order recusing himself was not effective until February 17, 1998, when it was filed[5], it is clear that the undersigned had jurisdiction over this matter on February 19, 1998, when the order that Taylor now seeks to vacate was signed and filed. Therefore, the court rejects Taylor's contention that the undersigned was without jurisdiction to rule on her original Rule 59(e) motion. Accordingly, Taylor's Rule 60(b) motion to vacate the February 19th Order, which is premised on the undersigned's alleged lack of jurisdiction to rule on her Rule 59(e) motion is DENIED.

2.

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[4]Although Judge McKellar informed the undersigned on November 7, 1997, that he would recuse himself and issued an Order that same day recusing himself and permitting the undersigned to hear Taylor's appeal *de novo*, the Order was not filed until February 17, 1998, because the case file for case 95-CP-40-4005 was in the undersigned's office until that time.

[5] *See* note 1, supra,

Taylor's "new" Rule 59(e) motion to alter or amend addresses the February 19th Order and is based on the undersigned's alleged lack of jurisdiction. Taylor's alleged inadequate notice of the nature of the November 5, 1997 hearing, and points previously raised in her June 30, 1997 memorandum submitted to the undersigned in support of her original Rule 59(e) motion. The court has carefully considered each of the grounds raised by Taylor and has concluded that none of the asserted grounds warrants disturbing the February 19th Order.

Taylor's contention that the undersigned lacked jurisdiction is without merit for the reasons stated in part 1 of this Order.

Taylor's contention that she was denied adequate notice of the nature of the November 5th hearing is equally without merit. The clerk's October 23, 1997 notice to the parties referred to the proceeding as a hearing on Taylor's "Motion for Rehearing Appeal." Further, Taylor came to the hearing armed with legal memoranda and documents in support of her claims that the Grievance Committee's decision was not supported by evidence and was legally infirm. Moreover, the transcript of the November 5th hearing before the undersigned reflects that Taylor was not only prepared to argue the merits of her appeal but took full advantage of the opportunity to do so. In sum the facts belie Taylor's contention that she was not adequately apprised of the nature of the November 5th hearing and was not given adequate opportunity to argue her appeal.

The remaining points asserted by Taylor in Support of her Rule 59(e) motion are nothing more than a rehash of the same points that she made in support of her original Rule 59(e) motion. The court addressed these points in its February 19th Order, and there is no need to repeat here what was said there.

The court remains satisfied that the Grievance Committee's decision is supported by substantial evidence in the record and is not controlled by any error of law. That being the case, the Grievance Committee's decision must be Affirmed. *See Cook v. S.C. Dep't of Highways and Public Transp'n*, 309 S.C. 179, 420 S.E.2d 847, 849 (1992); *O'Neal v. S.C. Dep't of Social Services*,
313 S.C. 223, 437 S.E.2d 127, 128 (Ct. App. 1993).

For the foregoing reasons, Taylor's Rule 60(b)(4) motion to

vacate the February 19, 1998 Order affirming the Grievance Committee's decision and her Rule 59(e) motion to alter or amend that Order are DENIED.

AND IT IS SO ORDERED.

s/ James R. Barber, III
James R. Barber, III
Presiding Judge

Columbia, South Carolina

August 12, 1998

STATE OF SOUTH CAROLINA	)	IN THE COURT OF
	)	COMMON PLEAS
COUNTY OF RICHLAND	)	
	)	
Carolyn M. Taylor,	)	C.A. No. 93-CP-40-2082
	)	and
Plaintiff,	)	C.A. No. 95-CP-40-4005
	)	
	)	
v.	)	
	)	
Wil Lou Gray Opportunity School, Mary Catherine Norwood, in her official capacity as Superintendent of Wil Lou Gray Opportunity School and the Division of Human Resource Management of the South Carolina Budget and Control Board,	)	ORDER
	)	
	)	FILED
	)	98 FEB 19 PM 3:38
	)	
	)	BARBARA A. SCOTT
	)	C.C.C. & C.S.
	)	
Defendants	)	

This matter came before the court on November 5, 1997. Pending at that time were plaintiff-petitioner Taylor's Rule 59(e) motion and her motion to disqualify the Honorable L. Henry McKellar, who originally heard Taylor's appeal from the final decision of the State Employee Grievance Committee and who entered the Order filed December 20, 1996 that Taylor to have the court reconsider by way her Rule 59(e) motion. At the outset of the hearing before the undersigned on November 5, 1997, the court informed Ms. Taylor — who, though previously represented by several different lawyers, is now *pro se* — and counsel for the Wil Lou Gray Opportunity School ("WLGOS"), that he would hear the appeal subject to Judge McKellar's agreeing to recuse himself or Judge McKellar's agreeing to the Court's hearing the 59(e) Motion.

Both parties were agreeable to this Court's proceeding. The court proceeded to hear Taylor's appeal. Both Taylor and WLGOS submitted written memoranda in support of their respective positions on the merits of Taylor's appeal, and both orally argued their positions in a two-hour hearing.

At the close of the hearing on November 5th, the court advised the parties the matter would be taken under advisement, subject to Judge McKellar's decision on whether he would recuse himself. Subsequently, Judge McKellar entered an Order recusing himself. Accordingly, the undersigned has jurisdiction to rule on this appeal. Upon consideration of the record, the submissions and argument of the parties and the law, the court has concluded that the decision of the State employee Grievance Committee at issue in this appeal must be affirmed.[6]

PROCEDURAL BACKGROUND

Due to the procedural complexity of this case, a brief summary of the proceedings to date is in order. Taylor was employed by WLGOS as a classroom teacher. Effective June 1, 1992, WLGOS had a reduction-in-force("RIF") which resulted in, among other things, the elimination of three occupied teaching positions. Taylor was one of the three classroom teachers who lost her job at WLGOS because of this RIF.

Following the RIF, Taylor sought to grieve her termination under the State Employee Grievance Procedure Act, S.C. Code Ann. § 8-17-310 et seq. Both WLGOS and the Budget and Control Board's

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[6]The court informed the parties of his intent to affirm the decision of the Grievance Committee in letter dated December 12, 1997. Taylor responded to this letter and challenged this court's jurisdiction and its decision on the merits . As a result of this letter, the undersigned held a hearing in open court on January 20, 1998, to address the matters raised in Taylor's December 30th letter.

Office of Human ("OHR") ruled that the termination was not grievable under the Grievance Act. Taylor then sought judicial review, Taylor alleged a cause of action against WLGOS under the Whistleblower's Act (S.C. Code Ann. § 8-27-10 through 8-27-50) and against the School's Superintendent in her official capacity under the First Amendment and 42 U.S.C. Sec. 1983. In that case (No. 93-CP-40-2082), Judge Kinard entered an Order on December 19, 1994, remanding Taylor's grievance appeal to the State Personnel Director (now Director of OHR) for the referral to the State Employee Grievance Committee. Under Judge Kinard's Order, the Grievance Committee was to determine whether Taylor's separation from employment with WLGOS was "due to a *bona fide* reduction-in-force or was the result of her whistleblowing."[7]

Following the remand, the Grievance Committee heard testimony and received evidence over the course of three days. On June 2, 1995, the Grievance Committee entered its Final Decision. The Committee found that Taylor was separated from employment pursuant to a *bona fide* RIF that was taken in good faith and in accordance with applicable policies and law, not her whistleblowing. Taylor moved for rehearing and/or reconsideration, but the Grievance Committee denied her request on August 9, 1995, and reaffirmed its prior decision.

After the Grievance Committee denied her motion for rehearing and/or reconsideration, Taylor retained new counsel and filed a petition for judicial review of the Grievance Committee's Final Decision. The petition was filed in the Lexington County Court of Common Pleas since Lexington County is where WLGOS is Located. With the consent of the parties, venue was transferred to Richland County on November 14, 1995 by Order of the Honorable William P. Keesley. Once transferred to Richland County, the appeal from the

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[7]With the consent of all parties, Case No. 93-CP-40-2082 was transferred to the inactive roster by Judge Kinard pending resolution of Taylor's grievance by the State Employee Grievance Committee.

Grievance Committee's Final Decision was designated Case No. 95-CP-40-4005. Following several postponements occasioned by Taylor's failure to arrange for a transcript of the hearing before the Grievance Committee and her discharge of her attorney, the appeal finally came on for hearing before the Honorable L. Henry McKellar on October 21, 1996. On December 20, 1996, Judge McKellar entered an Order affirming the Grievance Committee's Final Decision.

After securing new counsel, Taylor filed a Rule 59(e) Motion on January 6, 1997, requesting Judge McKellar to reconsider his ruling and to reverse the Grievance Committee's Final Decision. Before that motion was heard, Taylor's new counsel - Messrs. Louthian and Medlock — moved to be relieved. In an Order filed May 13, 1997, Judge McKellar, with Taylor's consent, granted Messrs. Louthian's and Medlock's motion to be relieved as counsel and granted Taylor sixty days to retain new counsel to argue her Rule 59(e) Motion. Thereafter, on June 30, 1997, Taylor filed a Notice of Motion and Motion to Disqualify Judge McKellar from ruling on her Rule 59(e) Motion.

This is the procedural posture the case was in on November 5, 1997, when Taylor's Rule 59(e) Motion was set for hearing before the undersigned.

THE MERITS OF THE APPEAL

As previously noted, the November 5th hearing before the undersigned was on Taylor's appeal was treated as a *de novo* hearing by the parties and the court. Ms. Taylor was given and took the opportunity to make full and complete arguments as to all issues. While this court has considered Taylor's arguments for reversing the Grievance Committee and has reviewed the record *de novo*, the fact remains that under judicial review provisions of te Administrative Procedures Act (APA) which govern this appeal, the court is not at liberty to substitute its judgement of the facts for that of the Grievance Committee. As the Supreme Court has repeatedly stressed, the scope of judicial review under the APA is strictly circumscribed, and courts must be ever mindful of their limited role in reviewing

agency decisions:

> The findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence. *Kearse v. State Health & Human Servs. Fin. Comm'n*, ___S.C.___, 456 S.E.2d 892 (1995). A court may not substitute its judgment for that of an agency as to the weight of the evidence on questions of fact unless the agency's findings are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. *Grayson v. Carter Rhoad Furniture*, ___S.C.___, 454 S.E.2d 320 (1995). Substantial evidence is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached. *Gibson v. Florence Country Club*, 282 S.C. 384, 318 S.E.2d 365 (1984).

Rodney v. Michelin Tire Corp., 320 S.C. 515, 466S.E.2d 357, 359 (1996). Moreover, "the burden is on the appellant to prove convincingly that the agency's decision is unsupported by the evidence." *Waters v. S.C. Land Resources Comm'n*, 321 S.C. 219, 467 S.2d 913, 917 (1996). This is a heavy burden, and one that Taylor has not carried.

The primary issue for resolution by the Grievance Committee was whether Taylor was terminated because of her whistleblowing activities or because of a bona fide RIF. This is quintessentially a factual issue, as the Supreme Court and Court of Appeals have both recognized. *Gamble v. City of Manning*, 304 S.C. 536, 405 S.E.2d 829 (1992); *Spencer v. Barnwell County Hospital*, 314 S.C. 405, 444 S.E.2d 538, 541 (Ct.App. 1994). Here, as in *Gamble*, the evidence was "clearly susceptible of more than one reasonable inference regarding the reason for (Taylor's) termination." 405 S.E.2d at 830. Indeed, the case was remanded to the Grievance Committee by Judge Kinard precisely because there was a factual dispute as to the reason for Taylor's

separation from employment. The Grievance Committee, after considering all the evidence and assessing the credibility of the witnesses, rejected Taylor's claim that she was targeted for elimination in retaliation for her whistleblowing, and found that she was terminated incident to a legitimate, lawful and non-retaliatory RIF. This finding is supported by substantial evidence in the record. The fact that the Grievance Committee might have weighed the evidence differently is irrelevant because "(t)he possibility of drawing two inconsistent conclusions from evidence does not prevent the agency's findings from being supported by substantial evidence." *Glen v. S.C. Department of Mental Retardation*, 291 S.C. 279, 353 S.E.2d 284, 286 (1987); see also, Millicent & Co. v. S.C. *Employment Security Comm'n*, 321 S.C. 349, 468 S.E.2d 638, 639 (1996); *Feeder v. Charleston County School District*, _____ S.C._____, 489 S.E.2d 191, 193 (1997) (agency's resolution of witness credibility is conclusive and not subject to judicial second-guessing).

The Grievance Committee further rejected Taylor's allegations that WLGOS improperly or inconsistently applied its RIF procedure and policy in several respects. These findings, too, are supported by substantial evidence and, contrary to Taylor's assertions, are not clearly erroneous interpretations of agency and/or state RIF policies or law.

The Grievance Committee found that Taylor was not entitled to "bump" one of two temporary grant employees at WLGOS. The Committee's decision on this point was supported by the testimony of the Superintendent of WLGOS, Dr. Norwood; the Assistant Director of the Office of Human Resources, Ms Donna Traywick; and WLGOS's Office of Human Resources liaison, John Wilkinson. The decision was further consistent with the Office of Human Resources Director's interpretation of state law and RIF requirements. The WLGOS RIF policy entitles an employee affected by a RIF to "bump" only if the bumping employee has "previously held permanent status" in the position into which she claims a right "bump." Ms Traywick testified that it is simply not possible for an employee to have "permanent status" in a Temporary position. Consistent with this interpretation, the Office of Human Resources advised WLGOS

that the three teachers who were laid off incident to the RIF could not "bump" into temporary grant teaching positions. Thus, the record reflects that, in not allowing Taylor to "bump" into a temporary grant position, WLGOS acted on the advice of and consistent with the guidance of the Office of Human Resources whose interpretations of state personnel regulations and RIF procedures are entitled to deference by the courts. *See Byerly Hospital v. S.C. Health and Human Services Finance Comm'n*, 319 S.C. 225, 460 S.E.2d 383, 386 (1995); *Emerson Electric Co. v. Watson*, 289 S.C. 394, 339 S.E.2d 118, 120 (1986).

The Grievance Committee also found that Taylor's retention points were not improperly calculated as she alleged. This finding, too, is supported by substantial evidence, and the Committee's reasoning on this matter is entirely logical. Taylor's claim that points were improperly calculated is based on her assertion that because teacher evaluations at WLGOS were improperly conducted in 1990 and 1991, all teacher evaluations should have been, but were not, disregarded. If all teacher evaluations had been disregarded, the RIF would have been based strictly on seniority rather than a combination of seniority and performance as the RIF Policy provides. As the Committee observed, while the teacher evaluations may have been technically deficient, there was no showing that they were substantially inaccurate. The Grievance Committee's conclusion that the teachers' 1990 and 1991 performance appraisals were properly considered in calculating retention points reflects the common sense notion that form should not be elevated over substance. Taylor's argument that a performance appraisal should be treated as if it did not exist whenever a technical deficiency exists in the evaluation document or process is simply not supported by the law and is contrary to common sense.

The Grievance Committee further rejected Taylor's claim that WLGOS improperly designated the competitive area (classroom teacher) within which the RIF was to be conducted. The Committee concluded that WLGOS had adequately explained the basis and rationale for its designation of the competitive area and its exclusion of vocational teachers. The Court agrees. As the testimony before the Grievance Committee reflects, the designation of the competitive

area(s) within which a RIF will occur is a management decision. The Superintendent of WLGOS is charged by statute the responsibility for the "operation and management" of the School. S.C. Code Ann, § 59-51-50 (cum. Supp. 1997). Neither the Grievance Committee nor this court should lightly undertake to second-guess the Superintendent's designation of a competitive area, and, as the Grievance Committee held, there is no reason to do so here. The Superintendent testified concerning her reasons for not including vocational and temporary grant teachers in the RIF, and her explanation was entirely rational.

The Grievance Committee also concluded that the Superintendent of WLGOS properly excluded the School's only certified foreign language teacher from the RIF. Taylor maintained that this teacher who was certified in and taught French, should have been included in the RIF because Taylor and another teacher could have taught French, even though neither was certified in French. The WLGOS policy allows the

Superintendent to exempt an employee from the RIF is the employee's "duties cannot be satisfactorily performed by any available employee in the order of selection after a reasonable training period." The Superintendent testified that before exempting the French Teacher from the RIF, she reviewed all teachers' personnel files to determine whether any other teacher was certified in a foreign language and that none was. It was, in fact, undisputed that the only teacher at WLGOS certified to teach a foreign language was the incumbent French, and that the Superintendent was unaware that any other teacher was qualified — certified or not — to teach a foreign language when she excepted the incumbent French teacher from the RIF. The Grievance Committee concluded that the Superintendent's decision to exempt the French teacher based on the Superintendent's opinion that no other employee could satisfactorily teach French after a reasonable training period was a decision that "fell within the management prerogative of the agency and is supported by substantial evidence in the record." The Court agrees.

The Grievance Committee also rejected Taylor's claim that WLGOS had improperly applied its RIF plan and policy by not hiring her for the classroom teacher position held by Mary Flynn, a certified

art teacher, when Flynn resigned. Ms. Flynn gave notice of her resignation on June 1, 1992--the date the RIF took effect and Taylor and the other two teachers were terminated. Ms. Flynn was certified in both art and science. Taylor was certified in math and science. The Superintendent decided to advertise for a teacher who, like Flynn, was certified in both art and science to fill Ms. Flynn's position. Dr. Norwood testified that she sought (and hired) a certified art teacher to replace Ms. Flynn because WLGOS had been successful in using art as a means to motivate and teach students in other subjects such as language arts, social studies and science. The Grievance Committee concluded: "WLGOS's decision to advertise for and hire a certified art teacher to replace Ms. Flynn, rather than retain the Appellant, constituted the appropriate exercise of management discretion and is supported by substantial evidence." This Court agrees. The same statute which vests the Superintendent with responsibility for the operation and management of the School also provides that the Superintendent "shall recommend and employ all personnel, as approved by the board of trustees, and shall define their duties." S.C. Code Ann. § 59-51-50 (Cum. Supp. 1997). The Superintendent's explanation for her decision to employ a certified art teacher is rational and was obviously accepted as such by the Grievance Committee.

Finally, the Grievance Committee rejected Taylor's claim that she had not been provided financial information to support the need for the RIF. As the Committee noted, the WLGOS RIF Policy provides that employees to be laid off in a RIF "should be informed" of "[t]he reason for the layoff." Taylor was informed of the reason for the layoff--"recent budget reductions"--in a letter dated May 5, 1992 from the Superintendent. Taylor's real complaint seems to be that she does not agree that "recent budget reductions" justified the RIF. This, however, is beside the point as the RIF policy requires only that affected employees be informed of the reason for the layoff, not that they agree that layoffs are necessary. Further, the evidence before the Grievance Committee was that WLGOS sustained budget reductions which caused it not only to eliminate three teaching positions--including Taylor's--but also to reduce other employees of the School

from twelve months of employment per year to ten or eleven months of employment. Even after adopting these belt-tightening measures, the School ended fiscal year 1991-92 with a deficit of more than $12,000 and was required to seek and receive a supplemental appropriation to close out its fiscal year. The Court, therefore, agrees with the Committee's conclusion that Taylor received the explanation that the WLGOS RIF policy called for and that WLGOS made no effort to withhold or conceal from Taylor any financial information concerning the RIF.

In sum, upon a review of the record, the Court has concluded that the Grievance Committee's Final Decision upholding Taylor's termination is supported by substantial evidence and is not affected by any error of law. The General Assembly established the Grievance Committee as the ultimate administrative authority to review a state employee's involuntary separation from employment. *Dawson v. State Law Enforcement Division*, 304 S.C. 59, 403 S.E.2d 124 (1991); *Bennet v. S.C. Department of Corrections*, 305 S.C. 310, 408 S.E.2d 230, 232 (1991). The Committee faithfully and painstakingly discharged its responsibility in this case, weighing the evidence and resolving disputed factual issues in reaching its ultimate findings, conclusions and decision. As previously noted, it is not the function of the court to substitute its judgment for that of the Grievance Committee; rather, the court's function is simply to determine whether the Committee's Final Decision is supported by substantial evidence. *Cook v. S.C. Department of Highways and Public Transportation*, 309 S.C. 179, 420 S.E.2d 847, 849 (1992); *O'Neal v. S.C. Department of Social Services*, 313 S.C. 223, 437 S.E.2d 127 (1993). Since the Committee's Final Decision is supported by substantial evidence, that decision is hereby AFFIRMED.

AND IT IS SO ORDERED.

s/ James R. Barber, III
JAMES R. BARBER, III

Columbia, South Carolina
February 19th, 1998

STATE OF SOUTH CAROLINA JUDGEMENT IN A CIVIL CASE
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS CASE NO. 95-CP-40-4005

CAROLYN M. TAYLOR

PLAINTIFF(S)

Wil Lou Gray Opportunity School, et al

DEFENDANT(S)

CHECK ONE:

( ) **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

( ) **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

( ) **ACTION DISMISSED (CHECK REASON):**
( ) Rule 12(b), SCRCP;
( ) Rule 41(a), SCRCP (Vol. Nonsuit); ( )Rule 43(k), SCRCP (Settled); ( )Other_____

( ) **ACTION STRICKEN (CHECK REASON):** ( )Rule 40(j) SCRCP; ( )Bankruptcy; ( )Other_____

IT IS ORDERED AND ADJUDGED: ( ) See attached order; ( ) Statement of Judgement by the court:

I hereby recuse myself from this case
Judge Barber can hear this case de novo

Dated at Columbia, South Carolina, this 7th day of November 1997.

s/ L. Henry McKellar
PRESIDING JUDGE

This judgement was entered on the ___ day of _____, 19___, and a copy mailed first class this _____ day of _____, 19___ to attorneys of record or to parties (when appearing pro se) as follows:

_____	Vance J. Bettis
_____	_____
_____	_____
ATTORNEY(S) FOR THE PLAINTIFF(S)	ATTORNEY(S) FOR THE DEFENDANT(S)

_____
CLERK OF COURT

SCRCP FORM 4
(REV. 2/96)

FILED
98 FEB 17 AM 10:48

BARBARA A. SCOTT
C.C.C. & C.S.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF
	)	COMMON PLEAS
COUNTY OF RICHLAND	)	
	)	
Carolyn M. Taylor,	)	C.A. No. 93-CP-40-2082
	)	and
Plaintiff,	)	C.A. No. 95-CP-40-4005
	)	
	)	
v.	)	
	)	
Wil Lou Gray Opportunity School, Mary Catherine Norwood, in her official capacity as Superintendent of Wil Lou Gray Opportunity School and the Division of Human Resource Management of the South Carolina Budget and Control Board,	)	ORDER
	)	
	)	FILED
	)	96 DEC 20 PM 3:41
	)	
	)	BARBARA A. SCOTT
	)	C.C.C. & C.S.
	)	
Defendants	)	

This matter is before the court pursuant to Carolyn M. Taylor's Petition for Judicial Review of the Final Decision of the State Employee Grievance Committee on her employee grievance against Wil Lou Gray Opportunity School ("the school"), her former employer. With the consent of the parties, venue over the Petition for Judicial Review was transferred from Lexington County to Richland County by Order of Judge William P. Keesley filed November 14, 1995. The appeal was scheduled to be heard on September 20, 1996; however, when the case was called, Taylor requested a continuance because she had discharged her attorney several days earlier. Judge Manning continued the hearing on the appeal until October 21, 1996, when the appeal was argued before the undersigned during a one hour hearing. Both sides presented written memoranda in addition

to oral argument. Having reviewed the administrative record and having considered the argument of the parties in support of their respective positions, the court has concluded that the Grievance Committee's decision that Taylor's employment was terminated as a result of a bona fide reduction-in-force ("RIF") should be affirmed.

This matter was originally remanded to the Grievance Committee by Judge Kinard, in an order filed December 19, 1994, to resolve the factual issue of whether Ms. Taylor's separation from employment with the school on June 1, 1992, was as the School contended, pursuant to a bona fide RIF that was undertaken in good faith and in accordance with the School's RIF procedures and regulations, and not because of her whistleblowing. The Committee entered its Final Decision setting forth its findings of fact and conclusions of law on June 2, 1995. Taylor thereafter moved for reconsideration and/or rehearing by the Grievance Committee, but, on August 9, 1995, the Committee denied that request and reaffirmed its Final Decision.

After the Grievance Committee denied her request for reconsideration and/or rehearing, Taylor commenced this proceeding seeking judicial review of the Grievance Committee's decision under the Administrative Procedures Act, S.C. Code Ann. § 1-28-380 (Cum. Supp. 1995). Section 1-23-380 provides, in pertinent part;

> (6) The court shall not substitute its judgement for that of the agency as to the weight of questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
>
> (A) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;

(d) affected by other error of law;

(e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or

(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

In her Petition for Judicial Review, Taylor contends that the Grievance Committee's findings and conclusions are "erroneous in view of the reliable, probative and substantial evidence on the record as a whole." After reviewing the administrative record, the court cannot agree with this contention.[8]

The South Carolina Supreme Court has consistently held that the standard of judicial review of administrative decisions under the APA is a deferential one. An agency's findings and conclusions are presumed correct and "the burden is on the appellant to prove convincingly that the agency's decision is unsupported by the evidence" Waters v. S.C. Land Resources Comm'n, ___ S.C. ___. 467 S.E.2d 913, 917 (1996); Rodney v. Michelin Tire Corp., __ S.C. __, 466 S.E.2d 357, 359 (1996). The agency's decision may be set aside only if the party seeking to overturn the decision proves that the decision is not supported by substantial evidence. Id. "Substantial evidence" is evidence that "considering the record as a whole, would allow

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[8]The final paragraph of Taylor's Petition for Judicial Review asserts, in conclusory fashion, that the Committee's findings, conclusions, and decision are " in violation of constitutional or statutory provisions; are unfairly biased; are in excess of the statutory authority of the agency; are made upon unlawful or irregular procedure; are affected by other errors of law; ... and/or are arbitrary or capricious or characterized by abuse of discretion, or clearly unwarranted exercise of discretion." (Pet'n, para 4) Such generalized and conclusory assertions are insufficient to warrant consideration by the court. See Smith v. S.C. Department of Social Services, 284 S.C. 469, 327 S.E.2d 348 (1985). Nevertheless, the court's review of the administrative record incident to Taylor's allegation that the findings, conclusion and decision "are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record" - which allegation is supported with specifics - does not support reversal under any of the grounds set out in Sec. 1-23-380(6).

reasonable minds to reach the conclusion that the administrative agency reached." Rodney, 466 S.E.2d at 359; Kearse v. State Health and Human Services Finance Commission, __S.C. __, 456 S.E.2d 892, 893 (1995). Significantly, "(t)he possibility of drawing two inconsistent conclusions from evidence does not prevent the agency's findings from being supported by substantial evidence.' Glenn v. S.C. Dep't of Mental Retardation, 291 S.C. 279, 353 S.E.2d 284, 286 (1987) (emphasis added); accord, Waters, 467 S.E.2d at 917. Where there is a conflict in the evidence, the Grievance Committee's resolution of that conflict is conclusive and cannot be disturbed on appeal. Glenn, 353 S.E.2d at 286; accord, Milliken & Co., 468 S.E.2d at 639; Hoxit v. Michelin Tire Corp., 304 S.C. 461, 405 S.E.2d 407. 409 (1991).

The Grievance Committee heard evidence in this case over the course of three days. After considering the testimony of the nine witnesses who testified and the voluminous documentary evidence, the Committee painstakingly reviewed Taylor's contentions and rejected them as not supported by the evidence. On the ultimate issue in the case (i.e., the one that Judge Kinard had ordered to be resolved by the Committee), the Committee specifically found that Taylor was separated from employment as a result of a bona fide RIF and not because of her whistleblowing. The Committee concluded:

> There is not credible evidence supporting the Appellant's charges that WLGOS acted pursuant to a reduction in force to retaliate against the Appellant because of her earlier assertions of agency inefficiency or malfeasance.
>
> We further conclude that WLGOS actions in this matter were all designed to advance the agency's overall mission and interest as an educational institution. The agency implemented its reduction in force consistent with applicable law and policy, even though that brought in conflict the agency's interests and objectives with the individual interests of the Appellant. On the record as a whole, we find that the

> agency acting in good faith, consistently and properly applied its reduction in force policy and plan, and the agency's actions are supported by the reliable, probative and substantial evidence in this case.

(Final Decision dated June 2, 1995, p. 9)

The administrative record amply supports the Grievance Committee's findings and conclusions. Documentary evidence contained in the Committee's Exhibit and in Agency Exhibits 1-5 all support the Grievance Committee's findings, conclusions, and ultimate determination that the RIF resulted in the elimination of three teaching positions at the School, including Taylor's, was not improperly or inconsistently applied. See S.C. Ann. § 8-17-380 (termination of employment incident to a reduction in force is grievable if the employing agency's RIF policy or plan is inconsistently or improperly applied). The committee's findings, conclusions and ultimate determination are also supported by the testimony of Dr. Mary Catherine Norwood, the Superintendent; Dr. Louise Scott, the School's board chair; Ms. Donna Traywick, the Assistant Director of the State Office of Human Resources; and Mr. John Wilkinson, the employee analyst at the State Office of Human Resources who coordinated with Dr. Norwood and the School Concerning the RIF and who approved, on behalf of OHR, the RIF plan that resulted in Ms. Taylor's separation. The testimony of these witnesses was that the School properly followed its RIF policy and plan as well as state personnel laws and regulations and that Taylor was separated from employment as a result of a bona fide RIF, not as the result of retaliation for her complaints about the School.

The General Assembly established the State Employee Grievance Committee as the ultimate administrative authority empowered to pass on issues pertaining to the propriety of a state permanent employee's separation from employment. Dawson v. State Law Enforcement Division, 304 S.C. 59, 403 S.E.2d 124 (1991). The Committee carried out its responsibility in this case, hearing and considering the evidence, resolving disputed issues of fact based on that evidence, and reaching its ultimate conclusions and decision

based on the record before it. It is not the courts function to second-guess the Committee on factual issues where the evidence is disputed. Since the Committee's decision is supported by substantial evidence in the record, it must be affirmed. Glenn v. S.C. Dep't of mental Retardation, 313 S.C. 223, 437 S.E.2d 127, 128 (Ct. App. 1993) ("Section 1-23-380 only requires the circuit court to determine whether the final decision of the Grievance Committee was supported by substantial evidence.")

Therefore, having reviewed the administrative record and having determined that the Grievance Committee's Final Decision is supported by substantial evidence, the Final Decision dated June 2, 1995 is

AFFIRMED.

AND IT IS SO ORDERED.

s/ L. Henry McKellar
L. Henry McKellar
PRESIDING JUDGE

Columbia, South Carolina

December 18, 1996

State Employee Grievance Committee

Final Decision

APPELLANT'S NAME: Carolyn Taylor
JOB CLASSIFICATION: Classroom Teacher
AGENCY: Wil Lou Gray Opportunity School
DATE OF HEARING: April 19 & 20 and May 15, 1995
NATURE OF CASE: Reduction In Force

FINDINGS AND RECOMMENDATIONS:

Based on documentary evidence and testimony presented at the hearing of Carolyn Taylor vs. The Wil Lou Gray Opportunity School, held in Columbia, South Carolina, on April 19 & 20 and May 15, 1995, the State Employee Grievance Committee finds:

FINDINGS OF FACT

1. The Appellant was a Classroom Teacher employed at the Wil Lou Gray Opportunity School. As a result of a reorganization of staff brought about by budget reductions, her position was deleted in a reduction in force. She was notified of this on May 5, 1992, in a letter from Mary Catherine Norwood, Superintendent of the Wil Lou Gray School (WLGOS). (Committee Exhibit, p. 86.) This letter further informed the Appellant that her position was to be deleted on June 1, 1992.

2. Edith E. Weaver and Joanne C. Brooks were Classroom Teachers at WLGOS in temporary grant positions. (Committee Exhibit, pp. 97, 119, and 121.) According to the State personnel rules and regulations, such employees are not considered as permanent employees and do not have grievance and other rights that permanent employees have. They are deemed to be employed at will. They do not have a right to participate in a reduction in force competition with

permanent employees. (Committee Exhibit, p. 9.) The positions held by Ms. Weaver and Ms. Brooks were, however, identified by the same classification code (9007) as other Classroom Teachers.

3. According to the rules that apply to state employees, the Appellant was termed an unclassified employee with permanent status. The classification code, 9007, and classification title, Classroom Teacher, refer to the document that describes the duties and responsibilities of the position, the training and experience requirements, and use of the position.

4. According to the State personnel rules and regulations that apply in a reduction in force, classified employees who hold permanent status have the right to "bump" into any classified position within the agency for which such employees have previously held permanent status. Unclassified employees with permanent status do not have a right to positions held by nonpermanent employees because unclassified employees do not hold permanent status in any position classification. (Committee Exhibit, p. 135.)

5. The Appellant was never employed at WLGOS in a temporary grant position as a Classroom Teacher.

6. WLGOS's Reduction-In-Force Policy was approved by the Division of Human Resource Management (DHRM) in September 1990. (Committee Exhibit, pp. 159-165.) WLGOS's Reduction-In-Force Plans were approved for procedural correctness by DHRM in April 1992 prior to implementation. (Committee Exhibit, pp. 152-58, 166.)

7. Robert James served as principal at WLGOS through the 1991 school year. In his capacity as principal, it was his responsibility to evaluate the performance of all Classroom

Teachers, including the Appellant. (Committee Exhibit, pp. 29-45.) Mr. James evaluated the Appellant at the end of the 1990 and 1991 school years, and he evaluated the Appellant's performance as "meets" performance requirements for both years. (Appellant's Exhibit 1, pp. 107-12; Committee Exhibit, pp. 36-45.)

8. On June 1, 1990, the Appellant wrote to Dr. Norwood with concerns about Mr. Robert James's evaluation of her performance during the 1989-1990 school year. (Appellant's Exhibit 1, pp. 105-06.) Her concerns included allegations that Mr. James had not observed her or other teachers in the classroom and that Mr. James had used the incorrect document for the evaluations. Dr. Norwood determined that Mr. James had not followed a formal procedure for observing all teachers and that he had used either incorrect or incomplete forms. (Appellant's Exhibit 1, pp. 71-3.) In 1991, the Appellant voiced these same concerns to the Board of the Wil Lou Gray Opportunity School. (Appellant's Exhibit 1, pp. 101-104.) The Board's Personnel Committee further investigates and determined that observation of teacher performance was "inadequate," but had been corrected by the Superintendent. The Committee also found that by error an older, outdated evaluation instrument was being used for teachers. (Committee Exhibit, p. 101.) In response to the Appellant's concerns about the evaluation of her performance by Mr. James, Dr. Norwood set aside James's "meets performance standards" evaluation of the Appellant in favor of a default evaluation of "meets performance standards." There was no finding by the Board's Personnel Committee, nor was there any subsequent evidence presented in this record, to support this proposition that utilization of different observation methods by the principal or use of a different form would have changed or affected the "meets requirements rating received by the Appellant and used to calculate her retention points. (Committee Exhibit, pp. 18-45:

Appellant's Exhibit 1, pp. 71-2.) No other teacher complained about the evaluation forms or the process used to reach the evaluation rating and no credible evidence was presented to support that these evaluations would have changed had a different form or process been used. Accordingly, these evaluations were properly considered in determining the retention points used in the 1992 reduction-in-force.

9. Mary Flynn was a certified art teacher at WLGOS who taught art classes and resigned effective June 1, 1992.

10. Dr. Norwood properly determined that the Appellant could not have satisfactorily performed the duties of an art teacher or a French language teacher within a reasonable training period, because the Appellant was neither certified as an art teacher or a French language teacher. (Appellant's Exhibit, p. 241.) There is no credible evidence that the reduction-in-force policy or plan used by WLGOS required the retention of the Appellant to teach art or foreign language courses, or any others existing in 1992 or thereafter, or that WLGOS acted arbitrarily, or inconsistently in assessing the most effective, efficient use of staff remaining or subsequently hired after the 1992 reduction in force.

11. Vocational teachers (class code 9009) were not included in the competitive group because each vocational teacher was certified in a separate vocational area and each would have been made an exception under Section IX of the Reduction In Force Policy. There was no claim that any classroom teachers were also certified in vocational areas.

STATEMENT OF POLICY AND CONCLUSIONS OF LAW

The applicable policy is WLGOS's Reduction-In-Force Policy. (Committee Exhibit, pp. 46-52.) A Reduction-In-Force is grievable by the affected employee "only if based on inconsistent or improper

application of a reduction in force policy, procedure, or plan." S.C. Code Ann. § 8-17-330 (1994 Cum. Supp.)

The State Employee Grievance Procedure Act of 1982 (Grievance Act) creates the Grievance Committee as a quasi-judicial review body that conducts de novo hearings of certain specified State employee grievance appeals. S.C. Ann. § 8-17-340 (1976). In addition the Grievance Act provides that this Committee "may sustain, reject, or modify a grievance hearing decision of any agency." Id. The Grievance Act also states: "The provisions of the State Administrative Act (APA) shall apply in proceedings before the State Employee Grievance Committee." Id. at § 8-17-330 (1976). This Committee sits in review on appeal of decisions under the agency's internal grievance procedure much like the circuit court sits in review, except for the Committee's mandate to have a de novo hearing.
Therefore, we look to the APA for guidance and adopt the APA's standard of review in S.C. Code Ann. § 1-23-380 (6) (1976). Consequently, this Committee can reject or modify an agency's internal grievance procedure decision if substantial rights of the Appellant have been prejudiced because that decision is:

(a) In violation of constitutional or statutory provisions;
(b) In excess of the statutory authority of the agency;
©) Made upon unlawful procedure;
(d) Affected by other error of law;
(e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
(f) Arbitrary or capricious or characterized by abuse or clearly unwarranted exercise of discretion.

The Appellant sets forth seven (7) grounds which she contends support her position that the Reduction-In-Force plan was inconsistently and/or improperly applied, and each ground will be addressed , in turn.

1. The Appellant claims that she was entitled to the

Classroom teaching position held by Ms. Weaver based upon her reading of paragraph 3 of section V., Competitive Areas, of the Reduction-In-Force Policy. This paragraph states:

> It shall be mandatory, however, regardless of competitive area, to provide any permanent status employee affected by reduction in force the right to any position within the agency for which such an employee has previously held permanent status and which is occupied by a temporary, provisional, or other nonpermanent employee.

While it was true that Ms. Weaver was a non-permanent employee, the Appellant was an unclassified employee. (See Findings of Fact, #4.) Pursuant to State law and regulations, the cited portion of Section V of the Reduction-In-Force policy does not apply and does not create any entitlement in the Appellant's case in WLGOS's temporary grant positions. Nothing in the reduction-in-force policy required WLGOS to offer the Appellant a grant position and the fact that the agency did not make such an offer to the Appellant was in keeping with applicable policy and appropriate discretion.

2. The Appellant claims that the computation of retention points was improper. The basis of this assertion was the use of a performance appraisal process and the forms that WLGOS found were "inadequate" or incomplete. The Appellant contends that the performance appraisals for the two years preceding the reduction in force for all instructors in her competitive group should be "set aside," at least for the purposes of determining retention points, so that all instructors received the same "meets requirements" as did the Appellant.

The Committee disagrees. Clearly, the inclusion of performance appraisals in the computation of retention points is to discriminate among employees with similar years of service to

allow the agency to retain those employees whose performance was judged to be better. Performance evaluations of any employee, including classroom teachers, require the exercise of judgement and discretion on the part of the supervisor. It was not sufficiently demonstrated that any of the defects in the form or process used in these evaluations invalidated the final results or required the agency to discount the results when implementing its reduction-in-force plan. The agency did not find, nor does any credible evidence herein reflect, that there was any bias, unfair consideration, or incompetency by the principal, Mr. James, in making the evaluations. All teachers were evaluated by the appropriated person for the purpose of assessing performance; the evaluations of all were reduced to writing on the same document; and then all employees were informed of the results. Setting aside these evaluations would be unfair to both the employees and the agency. Employees whose performance was recognized as exceeding performance standards would be penalized in the competition by the loss of points to which the policy entitled them, and the agency could be put in the position of retaining employees who had performed less well than others who would be laid off.

The idea of an evaluation defaulting to "meets performance standards" is a proper protection for employees who not receive their evaluations on time or at all. However, in determining that the evaluations done by Mr. James in 1990 and 1991 were inadequate, the agency did not determine the evaluations were invalid. In fact, the agency relied upon them to determine retention points. Since Mr. James's evaluations were used for all other teachers in determining retention points, the Committee concludes his evaluations of the Appellant should not have been set aside in favor of a default or presumptive "meets performance standards" evaluations, but should have been used. However, since the Appellant received "meets performance requirements" on the applicable evaluations, their utilization in determining the Appellant's retention points would not have changed the outcome in any way.

3. The Appellant claims that the two temporary grant (Chapter I) classroom teacher positions were improperly excluded from the reduction in force competition. The Committee disagrees. The purpose of the reduction in force policy is to afford permanent employees a measure of protection when it becomes necessary to lay off staff by establishing rules for the competition for available positions. Individuals in temporary grant positions are not permanent state employees and are not entitled to the protection afforded by the reduction in force policy. They are not entitled to compete for positions.

The Appellant also contends that the reduction in force competitive area for academic teachers was improperly designed, excluding certain vocational instructors from the competition. The agency adequately explained the basis and rationale for creating the competitive groups. Although reasonable men might differ on the wisdom of a management decision of this nature, the rationale used in selecting the employee classifications for the competitive groups was not arbitrary and is supported by substantial evidence.

The Appellant also maintained at the hearing that the agency should have retained her to teach a foreign language, specifically French, although she was not certified in this area and her credentials to teach foreign languages were marginal. Section IX of the policy, Exception in Special Cases, provides that:

If the position of an employee is not to be abolished and the duties cannot be satisfactorily performed by any available employee higher in the order of selection after a reasonable training period, the employee may be retained in preference to the employee with higher retention points. In such case a statement of facts must be made in the plan of reduction in force and approved in advance by the Agency Head.

The approved reduction in force plan for WLGOS included an exception for the only certified French language teacher. This teacher

did not compete because, in the opinion of the Board and the Superintendent, there was no other employee who could satisfactorily perform the duties of teaching French after a reasonable training period. This decision fell within the management prerogative of the agency and is supported by substantial evidence in the record.

4. The Appellant claims that the two non-permanent instructional employees have no right to continuing employment and that their positions should not be exempt from consideration in this reduction in force. The Committee agrees that non-permanent employees have no right to continuing employment either before or after a reduction in force. As stated in the findings of fact, non-permanent employees were not entitled to the protection afforded by the reduction in force policy. Management could have terminated the employment of either or both of the employees at any time for any reason or for no reason. However, in a reduction in force, as stated in paragraph 1 above, the Appellant, an unclassified permanent employee, does not have a right to a position held by non-permanent employees in temporary grant positions.

The Appellant further claims she was entitled to the position held by Mary Flynn, a certified art teacher, who resigned effective June 1, 1992. This claim is made pursuant to Section III, A. of the reduction in force policy. The record reflects that the Appellant was not a certified art teacher. The record further reflects that the agency determined that the Appellant, certified in math and general science, could not have satisfactorily performed the duties of an art teacher, even after a reasonable training period. The agency's decision was consonant with Section IX of the reduction-in-force policy (cited in paragraph 3. above). Considering the mission of WLGOS, the Committee concludes that WLGOS's decision to advertise for and hire a certified art teacher to replace Ms. Flynn, rather than retain the Appellant, constituted the appropriate exercise of management discretion and it is supported by substantial evidence.

5. The Appellant claims improper application of the reduction in force policy in retaining uncertified staff. The claim of retaining uncertified staff refers to one of the temporary grant positions. As concluded above, individuals in these positions do not participate in reduction in force competitions, The Appellant further claims improper application of the reduction in force policy by concluding that the person providing mathematics instruction in her stead was uncertified in mathematics. The committee concludes that once the reduction in force is effected, the Board, the Superintendent, and the principal must make decisions as to how remaining staff is to be used in order to accomplish the mission and purpose of the school. Again, this falls within the exercise of management prerogative and there was no credible evidence presented showing that the agency abused its discretion.

6. The Appellant claims that she has not been provided with financial information supporting the reduction in force. The WLGOS Policy provides at Section II, Preparation, C. Communications, that affected employees be informed of the reason for the layoff. Dr. Norwood's May 5, 1992, memorandum to the appellant informing her that she was to be laid off as a part of a reduction in force states in part, "This is to advise you that recent budget reductions have caused a reduction in force that will lead to the deletion of your position at the end of the school year." The policy requires that affected employees be given the reason for the reduction in force. The Committee concludes that WLGOS adequately met this requirement with the statement contained in Dr. Norwood's letter. There is no credible evidence that the agency attempted to withhold or conceal any financial information concerning the reduction in force at WLGOS.

7. The Appellant claims improper application of the reduction in force policy for the purpose of retaliation. The credible evidence in this matter was that there was a budget reduction at WLGOS that required a reduction in force be implemented. The Appellant was the third of three position affected by the reduction. The Committee can find no basis to conclude that WLGOS laid off two employees who

were not involved in any "whistleblowing type activities", such as Appellant's communications to the Superintendent and the Board about Mr. James's evaluations of teacher's performance, in order to retaliate against the Appellant.

In this matter, the Committee is faced with weighing the rights and responsibilities of the Appellant against the rights and responsibilities of WLGOS as they apply to the interest of each. The Appellant is most interested in the position she lost as a result of the reduction in force. WLGOS is most interested in its mission as an educational institution. The Committee concludes that both the Appellant and WLGOS have properly asserted their rights under the laws and policies that apply and in accordance with their proper interests. There is not credible evidence supporting the Appellant's charges that WLGOS acted pursuant to a reduction in force to retaliate against the Appellant because of her earlier assertions of agency inefficiency or malfeasance.

We further conclude that WLGOS's actions in this matter were all designed to advance the agency's overall mission and interests as an educational institution. The agency implemented its reduction in force consistent with applicable law and policy, even though that brought in conflict the agency's interest and objectives with the individual interest of the Appellant. On the record as a whole, we find that the agency acting in good faith, consistently and properly applied its reduction in force policy and plan, and the agency's actions are supportive by the reliable, probative, and substantial evidence in this case.

DECISION

The Committee finds for Wil Lou Gray Opportunity School and denies the relief sought by the Appellant.

For the Committee s/ John A Bloodworth, Jr Date 6/2/95

23A S.C. Code Ann. Regulation 19-704, (1983)

19-704 Employee Performance Management System.

19-704.01 Scope and Purpose

This document sets forth the regulations of the State Budget and Control Board for the establishment and administration of an Employee Performance Management System (EPMS) for the agencies of State government.

19-704.02 Regulations.

A. Each agency shall develop an Employee Performance Management System (EPMS) that shall function as an effective management tool within the agency and provide a sound process for the evaluation of the performance and productivity of its employees. Each agency shall have the flexibility within the criteria promulgated by the State Budget and Control Board to develop an EPMS that meets the special needs of the agency. Any agency that does not develop an approved EPMS shall come automatically under the model system developed by the State Personnel Division.

B. The review and approval by the State Personnel Division of the individual agency EPMS shall encompass all aspects of the program, to include compliance with the criteria established by the State Budget and Control Board, forms, training program and implementation schedule.

C. The State Personnel Division shall audit each agency's EPMS every two years to determine its compliance with the criteria and its effectiveness as a management tool within the agency.

D. Teaching and research faculty, professional librarians, academic administrators, and all other persons holding faculty appointments at post-secondary educational institutions, including any branch campuses, with the exception of technical education colleges and centers shall not be covered by these regulations but shall be governed by Sections 8-17-50 and 8-17-60, S.C. Code of Laws.

STATE OF SOUTH CAROLINA

EMPLOYEE PERFORMANCE MANAGEMENT SYSTEM

MODEL POLICY

Authority:

Subregulation 19-704.02, State Personnel Rules and Regulations, require that each agency develop the Employee Performance Management System (EPMS) for their agency.

Purpose:

The purpose of the Employee Performance Management System (EPMS) is:

-To provide an accurate and objective method to evaluate employees;

-To improve the work performance of employees in order to enhance efficiency and productivity for the State of South Carolina;

-To assist management in assigning work and delegating responsibilities based on a mutual understanding of the employee's skills and abilities;

To encourage continued growth and development of all employees; and

-To provide documentation to support recommendations for salary increases, promotions, transfers, demotions, and dismissals,

Implementation:

Wil Lou Gray

The Opportunity Sch EPMS policy will be effective 7-1-89

(Department) (Date)

Training:

Training shall be mandatory for all employees within the agency in regards to the EPMS. New employees shall be briefed on the performance appraisal system during the agency's orientation session(s).

General Information:

All permanent employees shall be given an annual appraisal no more than ninety calendar days prior to employee's review date. If an employee does not receive an annual appraisal prior to or on their performance review date, the employ shall be rated "meets performance requirements" by default.

An employee who is in probationary status shall be given an appraisal prior to the completion of the six month probationary period. If an employee does not receive an appraisal prior to the conclusion of the six month service date and the probationary period has not been extended, the employee shall be rated "meets performance requirements" by default.

All performance appraisals shall be made by the employee's Supervisor who has first-hand experience or knowledge of the work being performed and reviewed by the next higher level supervisor, unless the appraiser is the agency head, prior to the appraisal being discussed with the employee. The higher

level supervisor may attach additional comments to the appraisal, and in the attachment may take exception to any of the supervisor's appraisal points; however, the reviewer may not change the appraisal completed by the supervisor. The appraisal must bear the signature of the rater, the reviewer and the employee, if possible. If an employee will not sign an appraisal, a notation shall be made on the performance appraisal of this and, if possible, witnessed by a supervisory employee.

All performance appraisals shall become a permanent part of the employee's official personnel file. Upon request, the agency shall furnish the employee with a copy of the performance appraisal with copies of all pertinent attachments including the form completed at the time of the planning stage and the final appraisal form.

Procedure:

Step One: Planning Stage

Each employee shall have a planning stage conducted at the beginning of each rating period no later than 6 weeks after the completion of the most recent performance review. The supervisor should initially meet with the employee to discuss the position description and how it relates to the employee's job duties/objectives for the upcoming year. After this discussion the supervisor shall complete the planning stage document. Prior to discussing the completed planning stage with the employee, the supervisor shall present the final document to the reviewing officer for signature. The supervisor will then complete the planning stage by meeting with the employee to discuss his/her planning stage for the year and obtain the employee's signature. The completed planning document will be placed in the employee's personnel file to be used as the evaluation document at the

end of the year.

Job Duties: The supervisor shall select job duties from the employee's most recent position description and develop success criteria for each job duty.

Performance Characteristics: Performance Characteristics and their definitions should be directly related to the employee's job and may be selected from a list developed by the Division of Human Resource Management. Objectives: The objectives section allows for supervisors to document special projects/programs or career development. It is required for management employees and optional for non-management employees.

Step Two: Evaluation Stage

The supervisor will complete the evaluation document based on the employee's performance for the entire rating period. Job duties and objectives shall be rated on how well the employee has met the success criteria in the planning stage. Performance Characteristics will be rated "acceptable" or "unacceptable" based on the definitions which were communicated to the employee in the planning stage.

Forms:

There shall be two EPMS forms: one form for management employees and one form for non-management employees.

The management form shall be used for those employees who are responsible for rating and supervising other employees. Non-supervisory/professional employees, by class, within the agency may be evaluated on the management form.

The non-management form shall be used for those employees who are not responsible for rating and supervising other employees.

Levels of Performance:

All employees shall be rated on the following four levels of performance:

Substantially Exceeds Performance Requirements: Work that is characterized by exemplary accomplishments throughout the rating period; performance that is considerably and consistently above the success criteria of the job.

Exceeds Performance Requirements: Work that is above the success criteria of the job throughout the rating period.

Meets Performance Requirements: Work that is meets the success criteria of the job.

Below performance Requirements: Work that fails to meet the success criteria of the job.

*Performance Characteristics will be given a rating of "acceptable" or "unacceptable" instead of substantially exceeds, exceeds, meets or below performance requirements.

Acceptable - Meets requirements.

Unacceptable - Fails to meet requirements.

Success Criteria:

Success criteria should specify the expected level of performance necessary to obtain a "meets performance requirements" rating. The success criteria shall be

incorporated into each employee's performance appraisal for each job duty and objective. Success criteria are not required for performance characteristics. However, each performance characteristic shall be defined.

Substandard Performance:

In order to ensure that employees are given adequate notice of their substandard performance, along with the opportunity to improve such performance prior to formal evaluation, the following procedures shall be followed regarding substandard performance:

At least 30 calender days and no more than 120 calendar prior to an employee receiving a "below performance requirements" rating, the supervisor shall provide the employee with a written warning notice of substandard performance. Such notice shall include those items as listed below and the proviso that a rating of "below performance requirements" shall result if performance is not brought up to standard in the time period specified.

During the warning period, the employee and the supervisor shall have regularly scheduled meetings during which they shall discuss the employee's progress. These meetings shall be documented and included in the employee's official personnel file.

If the employee's performance is rated "meets performance requirements" or above at the end of the warning period, employment shall continue. If rated "below performance requirements", the employee shall be removed from the position immediately, i.e. dismissed, reassigned, demoted.

A special review (incorporating this substandard process) may be initiated at any time the supervisor believes that the

employee's performance is below standard. However, such a special review may not be initiated less than 30 calender days prior to the employee's review date.

Once a time frame for improving substandard performance has been given, the employee must be rated by the specified time or the employee will receive a "meets performance requirements" rating by default.

Any employee whose performance requires mor than two substandard warning processes within 365 days shall be terminated upon receipt of the third warning notice of substandard performance.

Warning Notice

An official warning notice shall include the following:

Must be in writing;
Addressed to the employee;
Labeled as a warning notice of substandard performance;
Deficiencies listed;
Ways of improving deficiencies listed;
Time period for improving;
Possible consequences if no improvement noted (i.e. dismissal, demotion transfer);
signed by the employee. If possible.

A copy of the official warning notice should be given to the employee and placed in the employee's official personnel file.

WIL LOU GRAY OPPORTUNITY SCHOOL

TEACHER FINAL EVALUATION

NAME: _____
SCHOOL YEAR: 19_____
DATE EMPLOYED _____ DATE ASSIGNED TO CURRENT POSITION___

INSTRUCTIONS

The teacher is to be evaluated on each item shown according to his/her performance in meeting the objectives and responsibilities outlined in the pre-conference. The principal should be objective in rating each item. The principal will place a check (X) in the appropriate box with favorable or unfavorable comments for each item rated. Summary comments will be made in each of the sections rated. The Principal and the Superintendent will review the evaluation. The Superintendent may attach additional comments to the evaluation and take exception to the appraisal if appropriate, but in no instance shall he change the evaluation of the Principal. In all cases, the rating will be discussed with and signed by the Principal, the Superintendent, and the teacher.

Each block will be checked according to the definition shown in Summary Evaluation section shown below:

SUMMARY EVALUATION
PERFORMANCE LEVEL CRITERIA

Box EPR - 3 Exceeds Performance Requirements: Work that is characterized by exemplary accomplishments throughout the rating period; performance that is considerable and consistently above the requirements of the position to which the employee is assigned;

only a small percentage of the employees shall qualify for this rating.

Box MPR - 2 Meets Performance Requirements: Work that meets the expectations and requirements of the assigned position throughout the rating period: performance may fluctuate during the rating period to include exceeding the job requirements in some areas; a large percentage of the employees shall qualify for this rating.

Box - BPR - 1 Below Performance Requirements: Substandard work performance below the job requirements.

Within the Scope of the employee's present duties and responsibilities, indicate your overall evaluation of this persons performance. In doing this, bear in mind the evaluation made on each of the items to be rated and the differing importance of each item.

Overall Evaluation_____

PRINCIPAL:_____ SUPERINTENDENT _____

REVIEWED ON (DATE):_____ TEACHER _____

APPROVED
DIV. OF HUMAN RESOURCE MGT.

s/ Phyllis M. Mayes 7/8/85

WIL LOU GRAY OPPORTUNITY SCHOOL

TEACHER EVALUATION AND CONFERENCE REPORT

19__ - 19__

Teacher_____
Subject_____ Highest Degree _____
Area of Certification_____Social Security _____
Certificate Number_____
Expiration Date_____
Years of Teaching Experience: (Total)_____

PROFESSIONAL GROWTH: (List courses taken, seminars attended, credits earned, etc., for the current Year which have contributed to professional growth and project any for this year).

COURSES, SEMINARS, ETC.

_____
_____
_____

_____

EVALUATION PROCEDURES

The Teacher Evaluation and Conference Report will be used for the evaluation of teaching personnel. One copy of the final formal evaluation will be prepared and sent to the Personnel. The form is to be signed by the teacher and the principal and the completed evaluation considered privileged information, i.e., confidential.

Within the first month of the school year, the principal and the teacher will meet to plan an evaluation schedule which shall include a minimum of one formal observation, one informal observation, and two conferences to review the observations. The formal observation should be the length of a regularly scheduled class. The evaluation's

observations should be evenly distributed throughout the school year. The evaluation conference shall be conducted informally following the two observations, the teacher and the principal will review pertinent findings.

The final evaluation shall be based on the current year's performance with the understanding that the teacher has been informed in previous conferences concerning areas needing improvement. The final evaluation should be returned to the Personnel Office by May 15.

The teacher and the principal may disagree on any item in the final evaluation. Signatures do not necessarily denote agreement but indicate that the items have been reviewed by both parties. Provision is made on last page of the instrument for extended statement(s) by either party.

APPROVED
DIV. OF HUMAN RESOURCE MGT.

s/ Phyllis M. Mayes 7/8/85

RICHLAND COUNTY CLERK OF COURT
1701 MAIN STREET
COLUMBIA, S.C.

NOTICE

October 13, 1997

TO: CAROLYN MURPHY TAYLOR
PRO SE
2295 BYRNES DRIVE

COLUMBIA SC 29204-

95CP404005
CAROLYN M TAYLOR
— vs —
WIL LOU GRAY OPPORTUNITY SCHOOL

THE ABOVE REFERENCED CASE IS SCHEDULED FOR

MOTION FOR REHEARING APPEAL

on Wednesday November 05, 1997 03:00 PM before Judge JAMES R. BARBER, III in Courtroom 3-A.

THE PLAINTIFF'S ATTORNEY IS TO NOTIFY THE DEFENDANT IN WRITING OF TIME AND DATE OF ALL DEFAULT AND DAMAGES HEARING,

ALL REQUESTS FOR CONTINUANCES MUST BE IN WRITING AND RECEIVED BY THE CHIEF ADMINISTRATIVE JUDGE PRIOR TO THE HEARING. PLEASE NOTIFY THE COURT IN WRITING IF THE MOTIONS ARE RESOLVED PRIOR TO THE HEARING

QUESTIONS CONCERNING THIS NOTICE SHOULD BE DIRECTED TO:

CHIEF ADMINISTRATIVE JUDGE
P.O. BOX 2766
COLUMBIA, SC 29202
FAX Number 929-6273

cc: CAROLYN M TAYLOR
VANCE J BETTIS

The Circuit Court of South Carolina
Fifth Judicial Circuit

James R. Barber, III
Circuit Court Judge
Richland County Judicial Center
P.O. Box 2766
Columbia, South Carolina 29201

(803) 748-4886
FAX (803) 252-2806
TDD (803) 748-4999

December 12, 1997

Vance J. Bettis, Esquire
900 Elmwood Avenue
Columbia, SC 29201

Carolyn M. Taylor
2295 Byrnes Drive
Columbia, SC 29204

Re: Carolyn M. Taylor vs. Wil Lou Gray Opportunity School
Case File No.: 93-CP-40-2082
95-CP-40-4005

Dear Mr. Bettis and Ms. Taylor:

I have reviewed Ms. Taylor's Notice of Motion and Motion to Disqualify and her Memorandum in support of the Plaintiff's Rule 59 (e) Motion and Motion to Disqualify. I have reviewed Ms. Taylor's Memorandum in Support of the Reversal of the Final Decision of the State Grievance Committee. I have review Mr. Bettis' memorandum in support of Affirmance of the Final Decision of the State Employee Grievance Committee. And I have read the transcript from the lenghty hearing conducted by the Grievance Committee.

Because Ms. Taylor is concerned about the previous decision

issued by Judge McKellar I have determined that the hearing before me should constitute a de novo hearing thus Ms. Taylor's appeal. Judge McKellar has no objection to his previous decision being vacated this mu ruling is based upon the merits of the case and of the appeal. The Order in this case should reflect that this was a de novo hearing on the appeal.

My review of the material set forth hereinabove convinces me that the appeal should be denied as there is substantial evidence which supports the factual findings and conclusions set forth by the Grievance Panel. The law presumes that a state agency's findings and conclusions are correct and a decision should only beset aside if there is no substantial evidence to support the agencies Order. I do not find that Ms. Taylor has been able to convince me that the Grievance Panels decision is supported by the evidence.

I would request that Mr. Bettis prepare an Order and submit it to me for my review. Please forward a copy the Order to Ms. Taylor prior to being submitted to me so that she may have a chance to offer comments. I reserve the right to make changes to te proposed Order or in fact change my decision.

Ms. Taylor is welcomed to contact my office and talk to my law clerk to make arrangements to pick up her copy of the transcript of the hearing.

Sincerely yours,

s/ James R. Barber, III
James R. Barber, III
Circuit Court Judge

JRB/dmd

Mary Catherine Norwood Direct Examination by Mr. Nickles

Record page 440

24 Q. Indulge me just a minute, please. Now let me get you to
25 look real quick, if I could, page 198 of the record, and

Record page 441

1 this letter is a letter from you to someone at Human R
Resource
2 Management Division. You see that?
3 A. I do.
4 Q. And it reflects it's in the study of a model policy and
5 you're going to adopt the weighting system proposed by
6 Human Resource Management. Correct?
7 A. Yes.
8 Q. That weighting system was a four base criteria instead of
9 the three base criteria. Isn't that right?
10 A. Yes.
11 Q. But you did not do that to teachers, did you?
12 A. No.
13 Q. And so, the evaluations of Ms. Taylor and others who
14 had the three base criteria would not have been in
15 compliance with that model. Isn't that correct?
16 A. I referring to — that's right. I was referring to the
17 EPMS policy.
18 Q. Okay, and the model policy that we're looking at starts
19 at page 179 of the record. You see that? Is that
20 correct?
21 A. I'm on page 170.
22 Q. 179. See State of South Carolina Employee Performance
23 Management System Model Policy?
24 A. Yes.
25 Q. Implementation, it's got a blank there, and Wil

Record page 442

Lou Gray Opportunity School, EPM (inaudible) effect 7/1/89
A. Yes.
Q. And you look over under general information on the next page, 180. It says, "All permanent employees should be given annual appraisal, no more than 90 calender days prior to the review date." You see that?
A. Yes.
Q. There's no exception there for teachers, is there?
A. No.
Q. At the bottom it says, Procedure Planning stage. Each employee shall have a planning stage conducted." There's no exception stated there for teachers, is there?
A. No.
Q. And 182, you see levels of performance? It says at the top, "All employees shall be rated."
A. Yes.
Q. And the four areas, "Substantially exceeds, exceeds, meets, and below." You see that? There's no exception there for teachers, is there?
A. No.

Record page 444

Q. Okay. And once again, this form here has three and not the four evaluative standards, correct?
A. Yes
Q. And that's the format that was used for all teachers. Isn't that correct?
A. Yes.

Record page 406

14 Q. So the board determined that there was a substantive
15 problem in the observation and then a problem with the
16 instrument itself. Isn't that right?
17 A. There were some pages missing from the teacher evaluation
18 instrument.
19 Q. And as a result, the teachers didn't receive a planning
20 stage, for example. Isn't that right?
21 A. Yes.

Record page 407

10 Q. So none of the evaluations which were used in determining
11 retention points had the four standards of performance
12 set by State Personnel. Isn't that right?
13 A. Right.

Record page 410

4 Q. So none of these teachers got complete evaluations.
5 Isn't that right?
6 A. They were missing the planning stage; yes, that's right.
7 Q. So they were incomplete, correct?
8 A. Yes.

Donna Traywick Cross Examination by Mr. Nickles

Record page 506

Q. Okay. And you acknowledge that there are different instruments even for evaluation teachers versus, say management and non-management employees?
A. Uh-huh.
Q. In fact, your office has approved different evaluation instruments for those types of employees, hasn't it?
A. That's right.
Q. And your office is the one that's responsible for (Inaudible) on an evaluation instrument, and requiring that it be followed by the agency. Correct?
A. That's correct.

Record page 510

Q. Well, here let's make a couple of assumptions, Ms. Traywick. Let's assume that in the evaluation of the employees of the Wil Lou Gray Opportunity School they didn't complete the planning stage for any of the teaching instructors. Okay? Now according to policy, if an evaluation is not completed by the evaluation date, it's an administrative meets, isn't that right?
A. That's right.
Q. And also there is a policy on the type of standards to which employees are held, I mean the criteria under which They're evaluated, like substantially exceeds, exceeds, meets, and below. Correct?
A. That's right.
Q. And that's been in effect since 1988. Isn't that right?
A. I think that's when it went into effect.
Q. And do you know whether here Wil Lou Gray Opportunity School implemented the four evaluation criteria for its

teachers?
A. No, I do not.
Q. So they may be, may have been using the wrong instrument altogether. Isn't that right?
A. That's that's possible. No, I don't, we don't police that.
Q. Okay. And let's say that I'm an employee and I've got

Record page 511

meets and exceeds. You know, one good thing can happen to me above meets, and that's exceeds, right? Isn't that correct?
A. Uh-huh.
Q. But if I'm an employee and I have meets, exceeds and substantially exceeds, I've got two levels above me. Isn't that right?
A. That's right.
Q. So if I'm doing the same job, under another instrument I may get a meets, but under another instrument I may get exceeds which is less than substantially exceeds. Isn't that right?
A. Uh-huh.
Q. So an if agency uses the wrong instrument, those people in like the B plus area might get, might just get a B instead of a B plus. Isn't that right?
A. Could be.
Q. Okay. And that could prejudice an employee, couldn't it, in terms of retention credits down the line?
A. Unless it was consistently applied throughout the organization.
Q. Now in the present case, would you agree that even if somebody has a job description, they're entitled to a planning stage of their evaluation? Isn't that standard under which state government operates?

Record page 512

A. Yes, it is.
Q. And even if I happen to like the result, even if I got an exceeds, if they didn't do a planning stage, I didn't receive a complete evaluation at the end of my year, did I?
A. Well, the process wasn't complete.
Q. Okay. And the process must be complete according to law, mustn't it?
A. Yes.
Q. Okay. So anything less than a complete process is essentially an invalid process, isn't it?
A. Well, that's, that's debatable.
Q. Well, according to the way it's written in the law, it has to be a completed process, doesn't it"
A. I, I'd really have to think about think about that.

Record page 513

Q. Now, if an employee doesn't receive a complete evaluation by the end of the year, they shall receive a meets, correct?
A. That's right.